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ABSTRACT

This document is a transcript of Congressional hearings on equal employment opportunity and affirmative action held in the summer and fall of 1981. Some of those who testified at the hearing included a professor of economics, a representative of the Rockefeller Foundation, directors of women's groups, directors of the National Association for the Advancement of Colored People and the National Urban League, officials of the U.S. Department of Labor, an assistant attorney general for civil rights, congresswomen, and a representative of Mexican American groups. In addition, prepared statements and other materials were given by these persons and others. The focus of the hearing was on the apparent intent of the Reagan administration to curtail severely the Federal Government's involvement in the enforcement of equal employment opportunity laws. It was also concerned with the administration's apparent inclination to abandon its heretofore substantial use of affirmative action as a tool by which to redress and hopefully eradicate the effects of past discrimination practiced against minorities and women. Witnesses traced the origins and background of discrimination against minorities and women, noted their still unequal share of better jobs, and said that the administration's policy of backing off on enforcement of affirmative action would be unfair to women and minorities. They pushed for the continuing efforts of government to create equal opportunity regulations and enforce those laws. (KC)

ED244137

OVERSIGHT HEARINGS ON EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION

Part 1

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
EMPLOYMENT OPPORTUNITIES

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

FIRST SESSION

HEARINGS HELD IN WASHINGTON, D.C. ON
JULY 15; SEPTEMBER 23, 24; AND OCTOBER 7, 1981

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OVERSIGHT HEARINGS ON EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION

Part 1

WEDNESDAY, JULY 15, 1981

House of Representatives,
Subcommittee on Employment Opportunities,
Committee on Education and Labor,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:15 a.m., in room 2175, Rayburn House Office Building, Hon. Augustus F. Hawkins (chairman of the subcommittee) presiding.

Members present: Representatives Hawkins, Clay, Washington, Peyser, Jeffords, Petri, and Fenwick.

Staff present: Susan Grayson, staff director; Edmund D. Cooke, Jr., legislative associate; and Terri P. Schroeder, staff assistant.

Mr. Hawkins. The Subcommittee on Employment Opportunities is called to order.

The subcommittee this morning is continuing its oversight of the Federal Government's enforcement of equal employment opportunity laws.

Our concern here today is with the apparent intent of the new administration to severely curtail the Federal Government's involvement in the enforcement of equal employment opportunity laws. We are equally concerned with the administration's apparent inclination to abandon its heretofore substantial use of affirmative action as a tool by which to redress and hopefully eradicate the effects of past discrimination practiced against minorities and women.

We intend to focus today on the emerging equal employment opportunity policies of the Reagan administration as disclosed both by statements of principal Cabinet officials and by the actions of those officials regarding matters relating to the enforcement of equal employment laws.

The subcommittee extended invitations to administration officials to present testimony this morning on the subject which we discuss. These invitations were extended to the Attorney General, William French Smith; Secretary of Labor Raymond Donovan; James Miller, Administrator of Information and Regulatory Affairs at the Office of Management and Budget; and Edwin Harper, Deputy Director of the Office of Management and Budget. Each of these administration officials declined to testify.

Of particular concern was the suggestion in two of the responses that this subcommittee and the Congress should await the administration's final actions before offering comment. It has long been our preference to participate in, not merely react to, policy or substantive changes affecting aspects of oversight responsibility. I hasten to add that our objective in these proceedings is not to hinder but rather to contribute to the valid reevaluation process undertaken for the purpose of improving these programs.

Today we see a real danger of destructive rather than constructive policy initiatives and program changes.

In a recent statement submitted to the President and the Congress entitled "Civil Rights, a National, Not a Special Interest," the U.S. Commission on Civil Rights examined the administration's recent budget proposals as they affect Federal civil rights enforcement programs. Significantly, that report concluded that the proposed reductions will adversely affect both the funding and the staffing of the five major civil rights enforcement programs studied, and cautioned: The report said:

> After examining the administration's proposed budget, the Commission is concerned that history may repeat itself and that the Nation may enter another period of civil rights retrenchment.
>
> Reducing allocations for specific civil rights enforcement activities will mean that millions of Americans will continue to be victims of discrimination in education, employment, housing, and Government services.

Such budgetary constraints merely exacerbate programs and regulatory changes which might otherwise be of minimal consequence.

The Attorney General, in a major policy address, stated his strong disapproval of the use of racial quotas in employment discrimination cases without offering any indication of what impact that policy stance will have upon the use of goals and timetables, which is the only objective way of measuring either compliance with a court decree or the successful implementation of voluntary affirmative action plans. Curiously, he suggested that, "we must begin to take a more practical and effective approach to the problem of occupational opportunity," without even so much as a hint as to what that approach might be.

The Secretary of Labor has forwarded to the Office of Management and Budget sweeping revisions of regulations governing the Office of Federal Contract Compliance Programs. The new administration under Secretary Donovan has recommended major changes to those regulations which would exempt between 75 and 80 percent of the currently covered employers, eliminate a provision which would bring contractors doing millions of dollars of business with the Government through small contracts within the Department's jurisdiction, and establish a policy which would create a 5-year exemption from compliance reviews for employers who prepare an acceptable affirmative action plan and a training program of some sort. Attacks on retrospective remedies, such as backpay as well as on goals and timetables, also seem likely in the near future.

Those actions suggest sympathy with the objectives of the regulated and an unfortunate disinterest in the plight of the classes of individuals presumably protected by the Executive order and its implementing regulations.

Despite these weighty concerns, I perceive a common ground. Indeed it behooves neither the protected classes, the regulated business nor the Federal Government to engage in needlessly burdensome, wasteful or antagonistic regulatory practices. That concern cannot be a basis for the curtailment of vital Federal Government oversight with its clear and unequivocal incentives to eliminate employment discrimination. Nor can it curtail its strong and certain exercise of the full range of remedial actions available to it.

We therefore hear this morning from the leaders of organizations whose constituents are affected by the policy decisions which this administration has made and will make in the future with respect to equal employment opportunity and affirmative action. It is our hope that the comments which they offer here will aid and guide our oversight of this important matter.

This is the first in a series of hearings which the subcommittee will hold on this issue. We look forward to hearing from other segments of the national community including the business sector in our future hearings.

The first witness this morning before the subcommittee is Vernon Jordan, president of the National Urban League.

Mr. Jordan, we are delighted to welcome you as our leadoff witness this morning. You are no stranger to the members of this committee. Certainly I would wish to give a personal note of congratulations to you on the very excellent job that the National Urban League is doing and also to recognize that in the next few days, and perhaps I suppose for a full week, you will be in Washington. Certainly the committee is delighted to welcome the National Urban League to Washington and to extend to you our full support and cooperation.

Mr. PEYSER. Mr. Chairman, would you yield?

Mr. HAWKINS. Mr. Peyser.

Mr. PEYSER. I thank you, Mr. Chairman, for yielding.

I also want to particularly welcome a former constituent of mine who moved away from me here in Washington and one who has built a reputation that is just outstanding and tremendous and the respect that he has throughout the country in all communities is something that very few people achieve in their lifetimes.

I also, Mr. Chairman, would like to make one brief comment because then I am going to be very interested to hear Vernon's testimony on this. It has been my opinion that the administration has taken the position that the poor and the lower middle-income people in our country will really be better off if the Government gets out of their business and lets them take care of themselves. It is sort of like setting someone adrift in the middle of the ocean with a few supplies and saying we hope you have a wonderful experience.

I would like to now hear some of the thoughts that Mr. Jordan has on this area and am looking forward to those comments.

Thank you, Mr. Chairman.

Mr. HAWKINS. If you would suspend for just one moment, Mr. Jordan, perhaps Mr. Petri might wish to make a statement at this point.

Mr. PETRI. No, thank you, Mr. Chairman.

Mr. HAWKINS. Again we welcome you. You may proceed.

[The prepared statement of Vernon Jordan follows:]

PREPARED STATEMENT OF VERNON E. JORDAN, JR., PRESIDENT, NATIONAL URBAN LEAGUE, INC.

Mr. Chairman and members of the subcommittee, I am Vernon E. Jordan, Jr., President of the National Urban League, Inc. The National Urban League is a non-profit community service organization which has for over 70 years sought the full and equal participation of the poor and minorities in all sectors of our society. Our commitment to equal opportunity necessitates our firm and unequivocal support of the concept of affirmative action. And I thank you for the opportunity to share these views so vital to all Americans.

First, I would like to clarify what is meant by affirmative action. Contrary to arguments popular in some quarters, affirmative action is not some arbitrarily developed concept designed to grant preferential treatment to minorities. It is not a device fashioned to infringe upon the rights of white males in our society. It is not a vehicle for constitutional subterfuge to sabotage the so-called tradition of "color blindness."

Affirmative action is first and foremost a legitimized constitutional remedy for past discrimination. It is a remedy in keeping with the basic principle that where there is a constitutional violation, there must be a remedy, appropriate in scope to that violation. Affirmative action seeks to redress over 300 years of discrimination—discrimination rooted in over 200 years of legal bondage and perpetuated by another century of legally sanctioned racial prejudice.

The remnants of past discrimination are manifest in race-conscious discrepancies between the lives of white and black Americans. Black children have shorter life expectancies than white children. Black families have median incomes disproportionately lower than white families. The unemployment rate of black adults doubles that of white adults and the rate for black teenagers nearly tripless that of white teenagers. Blacks are consistently underrepresented in professional positions, and statistics bear out that even with a college education, a black man is guaranteed a no more lucrative or stable place in the American workforce than a white high school droput.

I submit that such race-conscious inequities, whether resulting from intentional discrimination or from improperly structured systems, demand a race-conscious remedy in order to facilitate the equitable participation of blacks in the mainstream of society. As articulated by Justice Harry A. Blackmun in *Regents of the University of California* v. *Bakke:*

> In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.

Affirmative action has been implicitly within the remedial powers granted several federal government agencies since the inception of the Civil Rights Act of 1964. Courts have consistently held that race-conscious remedies are proper and in some cases, required to eradicate the effects of discrimination in employment, voting rights and education. The Supreme Court has affirmed the use of race-based mathematical ratios in school desegregation cases and numerical quotas relative to assuring equitable minority participation in electoral processes.

Yet, opponents of affirmative action insist that a race-conscious remedy somehow undermines the basic tenets of the equal protection clause and civil rights laws. The major arguments take two forms. The first is that the use of affirmative action is contrary to the notion that our Constitution is color-blind and permits no preferential treatment on the basis of race. The second is that affirmative action is in fact a form of reverse discrimination which jeopardizes the rights of non-minorities in our society.

Senator Orrin Hatch, Chairman of the Senate Labor and Human Resources Committee, recently introduced a constitutional amendment which would prohibit the enforcement of all race-conscious remedies whether voluntary or not. Upon introducing his anti-affirmative action amendment, the Senator voiced his concern for the safety of the tradition of color-blind equality:

> It is unfortunate that I should have to introduce this resolution when there is an existing constitutional provision—the 14th Amendment—that clearly states the principle in which I believe. Simply stated, it is that all persons within our nation are entitled to "equal protection" of the laws. There is little doubt in any mind,

however, that the original intent and clear meaning of this provision have been totally obliterated by our courts and by the bureacracy in recent years.[1]

I submit that such a statement in itself ignores "the general intent and clear meaning" of the 14th Amendment—an amendment purposefully enacted by the Reconstruction Congress for the express protection of newly freed black Americans. Black Americans, in particular, are very much aware of the egalitarian, colorblind principles that the Senator espouses.

But as an anti-affirmative action premises, the sacred tradition of a colorblind constitution is to black America a truly misguided concept. For centuries the black American could find no sanctity in this country's founding principles. Indeed the Constitution originally sanctioned the enslavement of blacks. Following Emancipation, the federal and state governments shunned the 13th, 14th and 15th amendments; the Supreme Court handed down the *Dred Scott* decision and *Plessy* v. *Ferguson*, rationalizing the disenfranchisement of blacks and sanctioning racial segregation. For black America, there is and has never been, any colorblind equality. And, at any rate, Senator Hatch's proposal acknowledges the fact that nothing short of constitutional revision can extinguish the legality of affirmative action.

The argument that affirmative action constitutes reverse discrimination is equally unsound. Its premise is that race-conscious measures such as affirmative action infringe upon the rights of non-whites and are therefore violative of the 14th Amendment. Proponents of this theory once again use the equal protection clause to deny the validity of a legal cognizance of race.

What they do no seem to take into account is that affirmative action is a remedy specifically designed to redress violations against the very group the amendment was enacted to protect. As long as the process of discrimination against minorities exists, there can be no reverse discrimination.

The acknowledgment of the illegality of racial segregation is not enough. Inferior educaiton, discrimination in employment and housing, and the legal ostracism of black Americans from the maintstream of society were the tools of disenfranchisement and segregation. Historic oppression has left a legacy of attitudes and actions indelibly ingrained in our institutions and social structures. The result is a structural process of discrimination whereby seemingly benign policies and interaction developed through a history of racial prejudice, have an adverse impact on the lives and overall well-being of minorities.

Still another popular argument put forth by opponents of affirmative action is that it is simply no longer necessary. These theorists admit that affirmative action was once a valid concept but is now out-moded due to the "meteoric" progress of minorities in society. But again this is a short-sighted argument. For the purpose of affirmative action is to facilitate a substantial equality of representation and participation of minorities in the electoral process, employment, housing, etc. In order to assert that this condition has been achieved, proponents must ignore some very obvious facts to the contrary that dispel the myth of meteoric progress by blacks.

The unemployment rate for black adults continues to double that of white adults, while black teenage unemployment is currently about 40 percent compared to a rate of about 16 percent for white teenagers. Official figures ending the year 1979 compute the median income of all black families at little more than 50 percent of that of white families.[2]

In the 1970's the number of poor white families fell by two percent (from 3.6 to 3.5 million) while the number of poor black families soared by 22 percent (from 1.4 million to 1.7 million). As the income gap between blacks and whites widens, so does the disparity in housing patterns. Blacks are disproportionately relegated to low-income urban housing and effectively excluded from new suburban developments by exclusionary zoning, higher costs and reduced construction.

The relationship between these disparties and the history of unequal treatment of black Americans is unmistakable. In the employment context, for example, the Supreme Court has acknowledged the efficacy of such statistics in determining discriminatory impact. In *Teamsters* v. *U.S.*, the Court wrote that such numercial disparities are significant because: "Such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a workforce more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." [3]

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[1] Congressional Record, p. 11918, Sept. 3, 1980.
[2] Black—$5,330, white—$10,209.
[3] 431 US 324, 340, n. 20 (1977).

While there is clear-cut evidence of the continued need for affirmative action, so, too, are there explicit examples of its effectiveness since the enactment of the Civil Rights Act of 1964. The rise in college enrollment among black Americans is indicative of the affirmative measures exercised by institutions of higher learning. During the decade 1966–76, college enrollment increased dramatically from 5 percent to 11 percent, and by 1975, 8 percent of all students enrolled in the senior year of college were black. Today, black enrollment is 11 percent, more than double that of 15 years ago.

In the workforce, black representation has increased significantly in fields traditionally unpenetrated by black workers. The National Urban League's *State of Black America 1981* reports:

Between 1975–80, the number of employed blacks increased by 1.3 million (from 7.8 to 9.1 million) or by 17 percent. Some of the biggest gains in black employment were in higher-status occupations. The largest increase (42 percent) occurred among blacks going into managerial and administrative jobs—which rose by 120,000 (from 287,000 to 407,000) over that five-year period. Similarly, the number of blacks in professional positions rose by 26 percent or 244,000, so that by 1980, close to one million (983,000) blacks were in that high-ranking category. Interestingly, despite the devastating effect that the two recesssions had on the construction industry, the number of blacks in craft positions increased by 197,000 (or 28 percent) to 890,000 in 1980.

Consequently, the number of blacks entering the three highest level occupations, (i.e., professional, managers, and craft) increased by 662,000 to 2.3 million in 1980. This growth in these higher level jobs accounted for over half (51 percent) of the total 1.3 million new jobs obtained by blacks between 1975–1980.

According to the results of a 1980 poll conducted by Black Enterprise magazine, affirmative action has been the greatest single contributing factor to the dramatic upsurge of blacks in higher-status occupations.

Blacks and minorities, however, are by no means the sole beneficiaries of affirmative action plans. First of all, the process of establishing affirmative action plans is generally practical and tailored to the specific unique character of the industry or employer in question. Examination of other areas of federal regulation snow that this is generally not the practice. Most regulatory schemes are general, but absolute, and do not permit the process of consideration and conciliation that is built into affirmative action statutory provisions.

In employment, for example, flexible tailoring of affirmative action plans allows fairer selection processes that benefit the employee workforce as a whole. In *United Steelworkers of America* v. *Weber,* in which the Supreme Court considered the legality of voluntary affirmative action plans in the context of employment, the unions and management of Kaiser Aluminum agreed that training would be provided for minorities and whites on a 50–50 basis. Before that agreement, opportunities for unskilled white workers to move into skilled crafts trades were practically non-existent.

The fact that affirmative action spurs the rethinking and reshaping of arbitrary, non-job related selection criteria opens many doors to employment for those persons who would otherwise be excluded by traditional old-boys networks and unfair promotion criteria.

As you well know, there is presently a major surge of anti-affirmative action initiatives in Congress. Among them are (1) Senator Orrin Hatch's proposed constitutional amendment to prohibit the enforcement of race-conscious measures, (2) Representative Robert Walker's fifth consecutive introduction of appropriations amendments to preclude the use of race-conscious numerical requirements by any governmental agency, (3) Representative Pete McCloskey's revised Executive Order which is designed to make major changes in OFCCP's authority to require affirmative action of federal contractors, and (4) Congressional proposals to severely limit EEOC's lead role in equal opportunity programs.

The National Urban League, however, is quite confident that the major questions relative to the legality of affirmative action have been answered. Executive Order 11246 is long-standing proof of acceptability as are Title VII of the Civil Rights Act of 1964, Provisions of the Emergency School Aid Act of 1972., and Section 8 of the Small Business Aid Act of 1977 to name a few.

Both *Bakke* and *Weber* affirmed the constitutionality and acceptability of voluntarily establishing a variety of practices which take race into account as a postitive factor. Since at least *U.S.* v. *Montgomery County Board of Education* (1969), the Supreme Court has been willing to approve numerical criteria in school desegregation cases. And in 1980, the Supreme Court, in *Fullilove* v. *Klutznick,* held that in federal grants to state and local public works contracts, Congress may properly require that a minimum percentage of funds be used exclusively to procure the services and supplies of minority owned or controlled businesses. *Fullilove* leaves no doubt that Congress is constitutionally empowered to mandate similar race-concious remedies where the need for such measures is shown.

It is indeed obvious that constitutional questions as to all major issues are now settled and should not be constantly reopened. The National Urban League is disturbed that it and other proponents are called on to defend that which the executive, judicial, and legislative branches of our government have construed necessary for nearly 20 years.

Justice Thurgood Marshall wrote in *Bakke* that "bringing the Negro into the mainstream of American life should be a state interest of the higher order." [4] Has Congress forgotten this? Certainly we must all realize that it will not happen by itself. Given the history of racial segregation and its concomitant legacy of institutional discrimination, it cannot happen by itself. Affirmative action is but one just and effective method of seeking access to full participation in American society for those for whom that right has been willingfully denied for over 300 years. Neither Congress nor the public should listen to its attackers until and unless they propose a more genuinely effective method.

In the meantime, we must all be carefully observant of what is happening in this country. There is an ever-burgeoning mood of selfishness that ultimately seeks the destruction of this nation's concern for the disadvantaged. If these assaults are not directly faced for what they are and defeated, the result will be a nation reneging on all that the civil rights movement once promised.

STATEMENT OF VERNON E. JORDAN, JR., PRESIDENT, NATIONAL URBAN LEAGUE, INC., ACCOMPANIED BY MAUDINE COOPER, VICE PRESIDENT FOR WASHINGTON OPERATIONS

Mr. JORDAN. Thank you, Mr. Chairman. Congressman Petri, Congressman Peyser, my former Congressman before I moved to the city where the people are and to Charlie Rangel's district, and to my friend Congressman Clay, thank you very much.

The National Urban League is a nonprofit community service organization which has for over 70 years sought the full and equal participation of the poor and minorities in all sectors of our society. Our commitment to equal opportunity necessitates our firm and unequivocal support of the concept of affirmative action. I thank you, Mr. Chairman and members of the committee, for the opportunity to share these views with this committee, views so vital to all Americans.

First, I would like to clarify what is meant by affirmative action. Contrary to arguments popular in some quarters, affirmative action is not some arbitrarily developed concept designed to grant preferential treatment to minorities. It is not a device fashioned to infringe upon the rights of white males in our society. It is not a vehicle for constitutional subterfuge to sabotage the so-called tradition of color blindness.

Affirmative action is first and foremost a legitimized constitutional remedy for past discrimination. It is a remedy in keeping with the basic principle that where there is a constitutional violation, there must be a remedy appropriate in scope to that violation. Affirmative action seeks to redress over 300 years of discrimination, discrimination rooted in over 200 years of legal bondage and perpetuated by another century of legally sanctioned racial prejudice.

The remnants of past discrimination are manifest in race-conscious discrepancies between the lives of white and black Americans. Black children have shorter life expectancies than white children. Black families have median incomes disproportionately lower than white families. The unemployment rate of black adults doubles that of white adults and the rate of black teenagers nearly triples that of white teenagers. Blacks are consistently underrepresented in professional positions. And statistics bear out that even with a college education, a black man or woman is guaranteed a no more lucrative or stable place in the American work force than a white high school dropout.

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[4] 438 US 265, 396.

I submit that such race-conscious inequities, whether resulting from intentional discrimination or from improperly structured systems, demand a race-conscious remedy in order to facilitate the equitable participation of blacks in the mainstream of society.

Justice Blackmun in *Bakke* articulated this as follows. He said:

> In order to get beyond racism we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot, we dare not let the equal protection clause perpetuate racial supremacy.

Affirmative action has been implicitly within the remedial powers granted several Government agencies since the inception of the Civil Rights Act of 1964. Courts have consistently held that race-conscious remedies are proper and in some cases required to eradicate the effects of discrimination in employment, voting rights, and education. The Supreme Court has affirmed the use of race-based mathematical ratios in school desegregation cases and numerical quotas relative to assuring equitable minority participation in electoral processes.

Yet opponents of affirmative action insist that a race-conscious remedy somehow undermines the basic tenets of the equal protection clause in civil rights laws. The major arguments take two forms. The first is that the use of affirmative action is contrary to the notion that our Constitution is colorblind and permits no preferential treatment on the basis of race. The second is that affirmative action is in fact a form of reverse discrimination which jeopardizes the rights of nonminorities in our society.

Senator Hatch, chairman of the Senate Labor and Human Resources Committee, recently introduced a constitutional amendment which would prohibit the enforcement of all race-conscious remedies whether voluntary or not. Upon introducing his anti-affirmative action amendment, the Senator voiced his concern for the safety of the tradition of a colorblind equality.

He said, and I quote him:

> It is unfortunate that I should have to introduce this resolution when there is an existing constitutional provision, the 14th amendment, that clearly states the principle in which I believe. Simply stated, it is that all persons within our nation are entitled to equal protection of the law. There is little doubt in any mind however that the original intent and clear meaning of this provision has been totally obliterated by our courts and by the bureaucracy in recent years.

That is taken from the Congressional Record of September 3, 1980.

I submit, Mr. Chairman and members of the committee, that such a statement in itself ignores the general intent and clear meaning of the 14th amendment, an amendment that was purposefully enacted by the Reconstruction Congress for the express protection of newly freed black Americans. Black Americans in particular are very much aware of the egalitarian colorblind principles that Senator Hatch espouses.

But as an anti-affirmative action premise, the sacred tradition of a colorblind Constitution is to black America a truly misguided concept. For centuries the black American could find no sanctity in this country's founding principles. Indeed, the Constitution originally sanctioned the enslavement of blacks. Senator Hatch, no doubt, has not read the *Dred Scott* decision which said that a black man has no rights that a white man was bound to respect.

Following Emancipation, the Federal and State governments shunned the 13th, 14th, and 15th amendments. The Supreme Court in *Plessy* v. *Ferguson* in effect sanctioned racial segregation. For black America there is not, and has never been, any colorblind equality in this country. And at any rate, Senator Hatch's proposal acknowledges the fact that nothing short of constitutional revision can extinguish the legality of affirmative action.

The argument that affirmative action constitutes reverse discrimination is equally unsound. Its premise is that race-conscious measures such as affirmative action infringe on the rights of nonwhites and are therefore violative of the 14th amendment. Proponents of this theory once again use the equal protection clause to deny the validity of a legal cognizance of race.

What they do not seem to take into account is that affirmative action is a remedy specifically designed to redress violations against the very group the amendment was enacted to protect. As long as the process of discrimination against minorities exists, there can be no reverse discrimination.

The acknowledgment of the illegality of racial segregation is not enough. Inferior education, discrimination in employment and housing, and the legal ostracism of blacks, Hispanics, and other Americans from the mainstream of the society were the tools of disenfranchisement and segregation. Historic oppression has left a legacy of attitudes and actions indelibly engrained in our institutions and our social structures. The result is a structural process of discrimination whereby seemingly benign policies and interactions developed through a history of racial prejudice have an adverse impact on the lives and overall well-being of all minorities in this country.

Mr. Chairman, I have additional testimony, but I would like to submit the rest of my testimony for the record and just simply say that this issue in my view should not be a debatable issue.

What we are talking about is a situation that has never been colorblind. It was not in the past. It is not now. And you and I know that it will not be that way in the future. We should not delude ourselves about what it is that we are talking about. We are talking about a society that is dominated by white males. We are talking about a society that has historically ostracized black people from the public sector and from the private sector.

I would say to this committee, although I am sure it does not need reminding, that title VII of the Civil Rights Act of 1964 did not come about because the private sector all of a sudden decided that it ought to do something about equal employment opportunities. It did not come about because people in Washington all of a sudden decided that black people were discriminated against.

The fact is that this was brought about by black people and white people who understood the situation, and it would not have had to come about if the perversity of the situation did not exist as it has for all of these years. We never would have had to have any of that if people would have done what they should have done, consistent with the Constitution, and that has not been done.

Mr. Chairman, let me introduce Miss Maudine Cooper who is our vice president for Washington operations and say to you that I am grateful for this opportunity to come and say what I have said. I feel it deeply. I think that this is as important an issue before this Congress and before this Nation as any other issue we could discuss because it gets to the very heart of what kind of country we are going to be in, the extent to which we are going to understand historic neglect and do something about it.

Thank you, Mr. Chairman.

Mr. HAWKINS. Thank you, Mr. Jordan.

The Chair would like to acknowledge at the witness table Miss Cooper, also no stranger to this committee and one who has worked very closely with the staff of the Subcommittee on Employment Opportunities.

My understanding is that your time is limited. I think everybody's time is limited these days, Mr. Jordan. I think your statement has already articulated rather clearly the position of the attack on quotas being used to rationalize what is perhaps a deep-seated conspiracy to undermine and to make meaningless the equal employment opportunity enforcement program.

Let me ask just one question, however. Assuming that the present trend—I suppose we can refer to it as a trend—in the administration is to do what we can only say it is going to do, because we have only had statements made unofficially and never officially before this or any other committee, what effect will this abandonment of the color-conscious remedies approach have specifically—let us say confining it to the employment of minorities and women? After all, I guess it is the final result that we are equally concerned about.

Will this improve? Will it set back the progress that we have made? What will be the practical effect?

Mr. JORDAN. Mr. Chairman, I am absolutely convinced that it would set it back. It will set the country back. It would further deepen the disillusionment of black people and other minorities as to whether or not this country is going to keep its commitment made in the 1964 Civil Rights Act, the Voting Rights Act of 1965, the Housing Act of 1968.

And in fact it is a basic reneging, not just on title VII but on the 13th, 14th, and 15th amendments, on the Declaration of Independence. It goes to the heart of what this Nation is all about. It is too difficult to contemplate the negative impact and the devastating impact that this can have in a situation where the country has made some effort, not enough, but some effort. And but for title VII the effort would not be there at all.

I do not believe absent title VII that the good people of this country or the bad people of this country would do anything about it. If you look at certain areas of the private sector, certain areas of the public sector, even with title VII they are found, wanting.

So I believe, Mr. Chairman, that the impact will be devastating. And for those youngsters who now see movements and have witnessed movement, and now have some hope, I think that that hope will be greatly dimmed if we get what is anticipated from this so-called colorblind institution. The word "colorblind" drives me mad in the sense that it was color consciousness that kept us out in the first place.

Mr. **Hawkins**. But in terms of the plant closings, the layoffs occurring, the rate of unemployment which has continued at the high level of 7 percent and is projected to reach almost 8 percent by the end of the year as a result of a deliberate policy of the administration, of the cutbacks that are taking place in training programs, of the lack of any job creation, and of the absence of an employment policy of the administration, are we therefore faced with the situation that with the reduction of employment opportunities for women and minorities, they will suffer an unequal or disproportionate share of the sacrifices that Americans are being asked to bear at this time?

Mr. **Jordan**. There is no question about that. Even with present enforcement we bear a disproportionate burden. Given what we both anticipate in terms of the economy, this disproportionate burden will be exacerbated given the cutbacks and what have you. The impact as I have said, Mr. Chairman, will be devastating.

Mr. **Hawkins**. I assume then you disagree that the needy are not being hurt or will not be hurt by the cutbacks, that they will in some way be helped by reducing these programs at this time.

Mr. **Jordan**. I do not want to say what I have to say Sunday night, Mr. Chairman.

Mr. **Hawkins**. We will not anticipate it. Perhaps some of us had better be present Sunday night.

Mr. **Jordan**. I hope to have a little to say about it.

Mr. **Hawkins**. Thank you.

Mr. Petri?

Mr. **Petri**. Thank you, Mr. Chairman.

I have a general question. What is your reaction to the request that I think was made by the Sears Co., or perhaps one of the others, in a recent lawsuit that the courts or the Congress try to clarify priorities within affirmative action. They found themselves confronted with a whole series of different categories of people they were supposed to take affirmative action for, not only blacks but women, veterans, native Americans, Americans with Hispanic surnames and so on? It added up to more than 100 percent of their employees.

Should there be ranking of affirmative action categories by Congress, or by someone, to assist employers in taking affirmative action if we are going to have the program?

Mr. **Jordan**. I think that the court decision in the Sears case deals with that. I would not like to address myself to that specifically. Mrs. Norton, formerly head of the EEOC, is going to be here to testify this morning. I would defer to her judgment and to her expertise on that particular issue as opposed to trying to address it myself.

Mr. **Petri**. Thank you, Mr. Chairman.

Mr. **Hawkins**. Mr. Clay?

Mr. **Clay**. Thank you, Mr. Chairman.

First I would like to commend my friend, Vernon Jordan, on an excellent statement. I think he dealt precisely with what the issue is.

I only have one question, Mr. Chairman. It has been asserted that affirmative action does not benefit the truly needy. Of course I do not know how to define "truly needy" unless we are talking about a calibration of suffering: hungry as opposed to most hungry and homeless as opposed to most homeless and shoeless as opposed to most shoeless. But that is the statement that has been made. In support of this contention some have stated that the actual beneficiaries of affirmative action are the middle class and their children and not those in the lower class.

How do you answer those critics that say that affirmative action programs do not benefit lower income people?

Mr. **Jordan**. First of all Congressman Clay, let me say that I agree with you. I do not understand what truly needy means either. I do understand what needy means. I do not know what truly added to that means. But maybe sometime during the course of the Urban League Conference those administration officials who will be speaking to us will define for our edification what truly needy means.

As to affirmative action benefiting some and not benefiting others, I do not believe that to be the case. I do not believe there are class or educational distinctions as relates to affirmative action. I think it applies to all ends, all levels of the job market, whether it is a local plant, or whether it is the executive office. I do not think it matters.

I do think, on the other hand, that it is clear in terms of measuring where affirmative action has absolutely worked. That is as relates to young people, black and white, coming out of business schools and law schools and engineering schools. I think that it is safe to say that there is a measurable standard of equity among young blacks and young whites, young Hispanics coming out of schools with specific training and education, that there is a remarkable sense of equity there. But that goes to qualifications. That goes to a particular job need. That goes to a given concept of supply and demand of these young people coming out.

I do not think that you can make that case at the lower end of the job market, and I think that it is at that lower end where you do in fact need the protection of affirmative action because I think that is where you get the most obvious discrimination. That is at the plant manager level. That is at the small business level. And I think that that is where it is clearly most needed.

In many instances those kids coming out of schools, law schools, business schools, engineering schools, can almost fend for themselves, given their qualifications and given the sort of new attitude about affirmative action in this country. But it is at the lower end of that structure that I think we need it more than any other place.

Mr. **Clay**. Thank you, Mr. Chairman.

Mr. **Hawkins**. Mr. Jeffords?

Mr. **Jeffords**. Thank you, Mr. Chairman.

Thank you for your very excellent testimony. I would like to say first of all that I have been a strong advocate of affirmative action programs and will continue to be so. On the other hand I am not as discouraged as some are by the actions being taken by the administration. I think it is important that we take them at their word.

Mr. JORDAN. Which word? That is my problem.

Mr. JEFFORDS. Let me give you the word as I understand it.

We are going through a difficult time, especially for some of us who have been dedicated to these kinds of programs. But certainly this particular program is not being picked on any more than many others are. As I understand it, the general philosophy of the Secretary of Labor and the administration in these areas is to step back and take a look at the situation, and to not be bound by what we have done in the past as far as the means or method of implementation. Let us make it clear that our goal is the same but maybe there are better ways of doing things.

Just recently, I have had long discussions with the Secretary on how we are going to include and expand the role of minorities, especially in the employment situations, not as far as affirmative action but just employment programs.

I will quote from a Department of Labor release of last Monday: Mr. Collier stated, "that the Department will ask for comment on the issues of backpay as a remedy for discrimination, the method for calculating availability of women and minorities in the work force, the appropriateness of extending affirmative action obligations to the nonfederally assisted projects of Federal construction contracts and alternative ways to set hiring goals for minorities and women in construction."

At least this time, I am going to take them at their word. That is, that they still have a strong goal toward affirmative action but are looking for more effective means, to achieve this goal. The rate should not be dominated by regulation but rather by trying to develop the proper attitudes and intent within the private sector to accomplish these goals rather than through the heretofore used means of very specific regulations and plans and goals.

I perhaps am overly optimistic but I think at least at this point I am willing to take the administration at its word and try to work with them to find innovative and better ways of getting things to work. I do not think any of us would say that what we have done so far has been as successful as we would like.

Mr. JORDAN. My response is that I am not prepared to take them at their word. I am not prepared to rely on good intentions. I am not prepared to rely on honor at this point simply because I think their good intentions and honor will leave us at the starting gate and will not in fact keep us going. I am not prepared to hold this process in abeyance on the basis of good intentions.

As I look at this administration's own affirmative action record as it relates to black Republicans who campaigned for this ticket, I would suggest to you that it has not acted in the political self-interest of black people who worked for them. That is the best measurement that I know of. I believe in the notion that to the victor belongs the spoils. But an awful lot of black Republicans who took it on the chin to campaign for this ticket cannot get work. I do not understand that.

That is honorable and that is good intentions and that judges us by what we do and all of that. And therefore, if it cannot happen to black Republicans who work for the ticket, Lord knows what will happen to black people generally, and Hispanics generally, and women generally. I would like to have those good intentions substantiated and enforced by a little regulation and a little encouragement and a little aggressiveness.

I would also suggest to you that even in the appointments of the head of the civil rights division in the Department of Justice, the new head of OFCCP, the new head of EEOC, that this administration has not even bothered to consult, to ask us what we thought. I suggest to you that if that is good faith and good intentions and that is the basis of your optimism, it is the basis of what I feel that is worse than optimism, I tell you that.

Mr. **Jeffords**. I appreciate those words and I can assure you that I will convey those messages back to the administration because I think the messages which you have given us here today are important.

I know for instance there was great concern about whether the President would live up to his statements about appointing a woman to the Supreme Court. There was great concern among women that he would not do that. He has done just that and he has appointed a woman who I think most of us would agree is a fine choice.

I think there is a great deal of suspicion that the administration in these areas will not keep its word. But I think it is too early to decide. There are people who obviously may not be doing the job they ought to be doing and it is important for you to be here to relay that message to me so I can relay that to the administration. Perhaps we can correct some of those problems.

Mr. **Jordan**. I applaud the President on his appointment of Judge O'Connor. I think it is a good thing. I am enthusiastic about her appointment. That is one seat on the Supreme Court.

But I am worried about the plants and the offices all over this country as they relate not only to blacks but to women and Hispanics and everybody else. I do not make a judgment based on what has happened in the Supreme Court that that will be the pattern throughout. Title VII was not controlling in the Supreme Court appointment but I want title VII controlling in the job markets throughout this country.

Mr. **Jeffords**. I understand. Thank you very much for your very fine message.

Thank you, Mr. Chairman.

Mr. **Hawkins**. Thank you, Mr. Jeffords.

Mr. Washington?

Mr. **Washington**. Thank you, Mr. Chairman.

I also wish to welcome you along with the other members of the committee, Mr. Jordan. The statement as usual is an excellent one and you go right to the heart of it.

I think you have another message for the President on page 10 in your conclusion, if I may quote:

> In the meantime, we must all be carefully observant of what is happening in this country. There is an ever-burgeoning mood of selfishness that ultimately seeks the destruction of this Nation's concern for the disadvantaged.

That is a good message for the President, but would you spell out the word "selfishness"?

Mr. **Jordan**. I think that the appearance of hard economic times, the reality of hard economic times, the feeling of scarcity is such that people by their very nature envelop themselves in an attitude of selfish privatism. I think that in good times Americans are reasonably willing to set another place at the table. But in times of inflation and double digit interest rates, what some people would interpret as scarcity, I think their selfishness is such that they are not prepared to share the crumbs from that same table.

I think that that is where we are. And I think that given what is being proposed here, those crumbs are going to be taken from this new class of people that we have discovered in the last 7 months, the truly needy.

My notion is that is a lack of understanding of the interdependent nature of this society, that we are interdependent, that we are interwoven, that we are interconnected and that we have to worry about everybody, that we cannot ask a certain group of people to bear a disproportionate burden which they historically have borne in this process, even in hard times.

Mr. **Washington**. Would that selfishness spill over into for example what is tacked onto the Voting Rights Act as perhaps one of the methods by which the disadvantaged can raise themselves up to the level of the rest of the country? Or is there a panorama? Is there a pattern? Is there something that is overriding all of these apparent disparate attacks upon jobs, voting rights, legal defenses? Is this what you mean by selfishness?

Mr. **Jordan**. Not only do I mean that by selfishness. I also mean that if you analyze everything we have heard, whether you are talking about affirmative action or budget cuts, the impact is selective. It is those at the bottom end of the ladder whether they are blacks or Hispanics or poor white people. It is those who need affirmative action who have been historically affected by the absence of it. It is those who make less money, need Government programs, need some kind of compassion, need some kind of help.

That is absent, and maybe that is the basis for the selfishness but nonetheless those who are bearing this disportionate load are those who have historically had to carry it. Somehow everything I have heard coming from down here, there is a great passage of scripture which is applicable to all of this. It says to those who have, to them shall be given; to those who have not, even that which they seem to have shall be taken away.

I think that is true in the discussion about affirmative action. I think that is true in the discussion about the budget cuts. I think that is true in the unwillingness to come on and say let's extend the Voting Rights Act of 1965. It does not need studying. We know what the situation is.

Mr. **Washington**. I will yield, Mr. Chairman.

Mr. **Hawkins**. The gentlewoman from New Jersey, Mrs. Fenwick?

Mrs. **Fenwick**. Thank you, Mr. Chairman.

It has been a long time, has it not?

I am sure that you agree with me and what you say reminds me of so much of the past. It is quite easy to tell where we have discrimination, is it not? I remember when we started in 1959 or 1960 trying to see what was happening to the skilled trades and to people in it, 4,742 registered apprentices of whom 14 were non-white. It is quite easy when figures like that will tell you exactly what the situation is. Affirmative action shows, as you say, 11 percent now of college-enrolled students are minorities. It is a big difference from what it was.

But on the other hand I too want to mention what we have tried to do. As a life member of the NAACP I was not very happy when CETA got sued by the NAACP in one of the counties in my State, and I did not blame them. These programs did not always work out the way they were intended. Enormous sums were flooded into hands for which they were never intended.

I think it is clear that we have to have a new approach, and good will and honor certainly have to be part of it. That is not enough, and there is no doubt of that, because all of these other programs were designed with good will too. And they failed. I am not talking now about the affirmative action programs which by and large do not cost. But they do require that people are going to be willing to put another seat at the table.

That is what we are talking about, is it not, not crumbs but seats at the table. Money is not necessary for that. You need a *Bakke* decision or you need something that does not cost very much but is clear as to what the intent is. The Supreme Court decision of 1977 was a very good one in relation to the Teamsters case which you cite in your statement.

We know where the troubles are. We know how you can measure whether or not we are moving in the right direction. We all know, those of us in public life, that decisions are going to have to be made that are not perhaps very popular. When you come to something like the busing proposals, I do not think any one of us who spent 25, 30, 40 years working in this field is going to vote for such a thing. Not that any mother I ever spoke to, black or white, likes busing, but it is a symbol of an intent, of a desire in this country to make the misunderstandings that have plagued our society irrelevant in the future. And there are going to be many other things of that kind that we are going to have to do.

But in the matter of programs, what are we going to do? There is where I would like very much—perhaps this is not the place and maybe other of my colleagues have different interests—to talk to you because the Urban League has always been particularly interested in the whole field of equal employment. As you remember I was Governor Hughes' chairman and we did some good work. We changed things in the banks and the insurance companies and the telephone company. We got some across-the-board big changes in New Jersey. It can be done, and it does not take money. It just take determination.

Ken Gibson which of course you know said something that has been a landmark for me. It was a question of some 50 Ph. D.'s leaving one of the companies. He said I do not want anybody to leave Newark. But I do not weep for 50 Ph. D.'s leaving Newark. I weep for my breweries, six of them, providing the kind of employment that people in Newark needed, the chance to rise within those breweries to positions of importance.

I do not know, Mr. Jordan. Give us, perhaps if this is not the place, some idea sometime.

Mr. JORDAN. I am not sure that this is the forum. But let me say that I do not believe that these programs have failed. To the extent that there have been problems in these programs, those problems are not problems caused by the beneficiaries. The beneficiaries are the ones who in fact are suffering.

So, I think that there is a big myth about the success and failure of these programs. And I think the measurement of that is not what we hear here, but those people who have actually benefited from them. I think that there is ample and documentable evidence that these programs for the most part have in fact worked.

Ms. FENWICK. But was not title VII very successful?

Mr. JORDAN. Unquestionably.

Ms. FENWICK. I think so too. And I think that is to be supported and will be. I am talking about II D and VI.

Mr. JORDAN. Mr. Chairman, there are many people to follow, most of whom have greater expertise in this matter than I do. I would like to yield my time, not only for their expertise but also because I have a big meeting coming up and I really need to go.

Mr. HAWKINS. Were you through, Mrs. Fenwick?

Ms. FENWICK. I am never through with Mr. Jordan, but we will have to resume another time.

Thank you. It was good to see you.

Thank you, Mr. Chairman.

Mr. HAWKINS. I think Mr. Peyser has something to say.

Mr. PEYSER. I will be very brief because I know your schedule is tight.

Thank you, Mr. Chairman, and thank you for letting me sit with you this morning.

I think it is important that you know as well that I do not think these programs failed. I think the statement of failure of programs is a tremendous cop-out that this administration and others have used as a way of simply cutting them out and saying well, now we can save some money in this area and let's see what is going to happen.

I recently spoke at a dinner of businessmen. Over 100 of them were present and they said at the outset in introducing me that they hoped I understood as the President said that we all had to make sacrifices and they were prepared, along with everyone else, to make those sacrifices.

When I got up I said I would like someone in this room tell me what sacrifices you are going to make because of the change in the program; I want to allow time for that. Are you going to cut back on vacation time or are you not going to do a number of things that you would do? Of course there was no response, because there is no sacrifice at that level that resembles anything compared to what is being asked of people at low middle income and poor levels.

Very briefly I would like to ask you what do you see—and this is a much broader question than just the area on which you are here—is the impact on the black community, on low middle income people and poor all over of these vast changes that have been voted in the Congress in the new budget program, the changes in jobs and education and school lunch and Pell grants? What do you see the real impact to be within the next year?

Mr. JORDAN. That takes a long answer but I will try to give you a short one.

What it suggests is that some people as a result of this budget will be making choices between food and fuel come the wintertime. Other people will be deciding whether or not to go to Hope Sound or to stay at home. That is a hell of a difference in terms of what choice you make. I think we have to be worried about those people who will have to choose between food and fuel and survival as opposed to those people who will be deciding between Martha's Vineyard or Hope Sound. I think it comes just to that, Mr. Chairman.

Mr. PEYSER. Thank you, Mr. Chairman.

Mr. HAWKINS. Mr. Jordan, I know that your time is limited. This will conclude the questions to you and I assume to Miss Cooper as well. Again we wish to express sincere appreciation for your testimony before the committee this morning. I think it has helped tremendously, and certainly we want to thank you sincerely for the time that you have devoted to this subject and for the cooperation you have given to this committee.

Mr. JORDAN. Thank you , Mr. Chairman.

Ms. COOPER. Mr. Chairman, as a parting remark, many of the questions and comments that have been raised here will be addressed by the Washington operations in its affirmative action paper which will be released at the National Conference on Tuesday. The title of the paper is "Affirmative Action 1981: Debate, Litigate, Legislate and Eliminate?" You may recognize those first three words as coming from the statements of Senator Moynihan.

Mr. HAWKINS. Thank you, Miss Cooper, and thanks again, Mr. Jordan.

Mr. JORDAN. Thank you.

Mr. HAWKINS. The reference, Mrs. Fenwick, was made by you as to the workability of the programs that are now being eliminated. With respect to the one within the jurisdiction of this committee, the Comprehensive Employment and Training Act program in which you constantly refer to title II and title VI, I should like to inform you that the staff is engaged in monitoring the results of the termination of the CETA employees, CETA trainees. If you wish to be advised from time to time on that, we certainly will make that information available to you.

I might just simply say that so far in monitoring what has happened since the deferrals and the elimination of the funding of the first group of CETA employees, it seems rather conclusive that the placement rate on unsubsidized private sector jobs under CETA was substantially better than that which has happened under the present administration's program of finding jobs for those individuals in the private sector.

In other words, there have been more jobs created in the private sector by CETA, that is by the public service employment program, than are now being created by the efforts of the Reagan administration since the elimination of the program.

If you want to judge results I think you would have to reevaluate the opinion that you have of this program and what is happening to these individuals once they have been cut loose from these training programs. As I said, we would be very glad to share these results with you from time to time as they come in.

Ms. **Fenwick**. I am grateful to the Chairman. I did not myself pick out II D and VI as being undesirable. They were suggested to those administrators of the program who came to my office. The word was, "just get rid of II D and VI and we can run a decent program."

You know, Mr. Chairman, of my enthusiasm for title VII. I think it is one of the finest programs that we have had. I may say also, concerning title III, under those special demonstration grants, that I have a wonderful program in my State which places 100 percent of every graduate in the private sector. I am enthusiastic about what works. What I am not enthusiastic about is an enormous program which does not seem to benefit the people who are supposed to benefit and which results in such discrimination and injustice that an organization of which I am a happy member has to sue.

Mr. **Hawkins**. I do not know to what specific program you are referring.

Ms. **Fenwick**. I am referring to CETA.

Mr. **Hawkins**. You have not defined which part of CETA that you refer to when you say that it has not worked.

What I am saying is that if you take the record of what has happened in the training field since CETA was in the process of being eliminated and consider the fact that only 15 or 20 percent of trainees are now being placed in unsubsidized jobs without CETA—whereas 60 percent were placed in unsubsidized jobs when we had the CETA that you refer to, you would have to conclude, despite its problems—and you and I have gone through many problems—that since the placement rate was so much better under the original CETA program than it is now, we should reevaluate it.

And the point of the hearing is that if those who wish to make these statements publicly would come before the authorizing committees and permit us to examine the statistics that they use and to work with them to fix up these programs, as you and I attempt to do with different views, perhaps we could improve the programs. But what we have now is no programs.

Ms. **Fenwick**. Please keep me informed, Mr. Chairman. We will work as we have in the past.

Mr. **Hawkins**. Yes, certainly.

Mr. Washington?

Mr. **Washington**. Thank you, Mr. Chairman, for recognizing me at this time.

I want to take the time to concur in your opening statement, Mr. Chairman. I am extremely disappointed that the administration has refused to permit witnesses to present testimony in these hearings. The agencies invited have responsibilities which are clearly within the purview of your subcommittee.

It was also noted that the administration was willing to testify some weeks ago in the hearings convened by the counterpart of this subcommittee in the Senate. So I regard the excuse that they have had insufficient time to prepare their positions as patently fallacious.

I am also concerned because this seems to be a pattern that I have noted with respect to civil rights matters here. The Subcommittee on Civil and Constitutional Rights has received similar responses or nonresponses from this administration. First, key appointments are not made. Then when the Congress asks for information about what is actually going on with these programs in the interim, we are told that there is no one at present to testify because 7 months into the administration no appointments have been made. Yet budgets and operating plans are being finalized.

It is a curious situation, Mr. Chairman, and one which I think goes right to the heart of the oversight responsibilities of this Congress and of this subcommittee and of the rights of the American people to know exactly what this administration is doing or not doing on these very vital issues.

I look forward to the series of hearings here and I hope that in the process perhaps some dialog can be established between the administration and the Congress on these vital issues. But I must say that I find their treatment of both these programs and the concerns they present to be both cavalier and indifferent.

It certainly does not foster trust and confidence among individuals protected by these laws, so much so that I think at this point the administration has a clear responsibility to come forward and state not what it is against but what it has reservations about, what it is for, what it plans to do.

So I commend you, Mr. Chairman, for convening these hearings which, as they educate us, I hope will serve to remind the administration that it has been guilty of neglect with respect to civil rights and that the American people are watching them very carefully.

Thank you, Mr. Chairman.

Mr. **Hawkins**. Thank you, Mr. Washington.

The next witness is the Honorable Arthur S. Flemming, Chairman of the U.S. Commission on Civil Rights.

Mr. Flemming, I am sorry that we have delayed you as long as we have and have taken little side roads. But again we wish to welcome you before this committee.

I know that over a long period of time you have been one of the dependable witnesses that we have always referred to. We have quoted you. Some of us are Republicans; some of us are Democrats. We are in and out, but regardless of the administration you seem to continue. So perhaps we can learn something from you in terms of longevity and your particular role in government. It has been a very distinguished role and we certainly salute you and commend you and look forward to your testimony before this committee.

Mr. **Flemming**. Thank you, Mr. Chairman.

[The prepared statement of Arthur Flemming follows:]

PREPARED STATEMENT OF ARTHUR S. FLEMMING, CHAIRMAN, U.S. COMMISSION ON CIVIL RIGHTS

Mr. Chairman and members of the subcommittee, I am Arthur S. Flemming, Chairman of the United States Commission on Civil Rights. The Commission is pleased to respond to your request for our testimony in the course of your oversight hearings on the new administration's policies concerning equal employment opportunity. Accompanying me today are John Hope, III, Deputy Staff Director, and Jack Hartog, Assistant General Counsel and director of our Affirmative Action Project.

The Commission recently issued a report entitled "Civil Rights: A National, Not A Special Interest." That document was the basis of Commission testimony to the

Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee in connection with an oversight hearing on the possible impact of pending budget proposals on civil rights. The report reviews the proposed cuts in Federal civil rights enforcement efforts, as well as proposed reductions in or elimination of 10 social and economic programs integrally related to civil rights progress. The report also analyzes proposals to establish a block grant approach in numerous areas.

The first two chapters of our report relate the pending budget proposals to the history and purpose of the 13th, 14th, and 15th amendments. We point out that following the adoption of these "Civil War amendments" and the enactment of some implementing legislation, the Nation turned its back for 100 years on the concepts of freedom and equality for members of the black community. *Brown* v. *Board of Education* revitalized the Civil War amendments and marked the beginning of a new era of hope. In our report, we raise the question of whether the pending budget proposals foreshadow another period of retrenchment, rather than advancement, in the area of civil rights.

We are especially concerned about the Federal role in dealing with the effects of past and present discrimination on the lives of minorities.

Our report, for example, notes that there will be a loss of 697 positions—nearly a 10 percent cut—in the five major civil rights enforcement agencies. This reduction, our report concludes, is likely to limit actual enforcement, undercut the deterrent effect of Federal enforcement by diminishing the credibility of potential Federal liability, and weaken the ability of the Federal government to assist those who would voluntarily fulfill their civil rights obligations.

Our report also notes that the budget proposals would completely eliminate or sharply cut Federal programs, such as those providing comprehensive employment and training, economic development and small business assistance, that are designed to open new opportunities for employment for minorities and women.

The Commission has long held that if we are to combat discrimination in the field of employment effectively, both public and private employers must make the fullest possible use of the management tool that has come to be known as affirmative action. We have also vigorously supported the use of affirmative action as an indispensable part of the enforcement of Executive Order 11246 by the Office of Federal Contract Compliance Programs in the Department of Labor. This presidential program, which has been supported by Presidents of both parties, requires businesses that contract with the Federal government not to discriminate and to develop and implement affirmative action programs. In brief, we believe that employers, public and private, must set goals and timetables for the employment of minorities and women. They must then develop action programs designed to achieve these goals within the specified time frames. These action programs should assign specific duties and responsibilities to appropriate employees, and should penalize those who fail to discharge them and reward those who successfully discharge them.

Recently, the Commission released and widely circulated a proposed statement, Affirmative Action in the 1980s: Dismantling the Process of Discrimination. Subsequent to releasing the proposed statement, the Commission held two consultations on this document. These consultations provided the Commission an opportunity to receive and consider comments on the proposed statement from a wide range of proponents and critics of affirmative action. My remarks on affirmative action today are based on this document, which the Commission is presently reviewing. With the understanding that this review is likely to produce some modifications, I would like to submit a copy of the proposed statement for inclusion in the record of this hearing.

The following are some of the major points underlying the proposed statement.

1. Affirmative action exists because of the nature and extent of the problem of race, sex, and national origin discrimination, and can only be discussed productively if the problem of discrimination is recognized.

Because affirmative action by definition means remedial action that to one degree or another deliberately takes race, sex, or national origin into account, it appears at odds with the ideal of a "color-blind" America that makes decisions wthout reference to race, sex, or national origin. How can remedial means that consciously use race, sex, or national origin be reconciled with ultimate ends that preclude any consciousness of race, sex, or national origin?

Our proposed statement seeks to make clear that any supposed means-end conflict between affirmative action and eliminating discrimination can be resolved. Such resolution will be found through a more precise understanding of the nature and extent of today's patterns and processes of race, sex and national origin discrimination. Abstract, philosophical debates over means and ends, our proposed statement argues, will remain unproductive. Greater agreement is most likely to emerge from a practical, concrete analysis of how the problem of discrimination manifests itself and then of what remedies will most effectively eliminate such discrimination. It is for this reason that the Commission's proposed statement adopts a "problem-remedy" approach that continually unites the remedy of affirmative action with the problem of discrimination.

Critics of affirmative action do the exact opposite. They consistently divorce affirmative action from the historic and continuing problems these remedies were created to address. They then argue as if the discriminatory conditions that make affirmative remedies indispensable do not exist. But just as medical treatment is conducted on the basis of the diagnosis of an illness, the remedy of affirmative action depends upon the nature and extent of the problem of discrimination.

We therefore urge that this subcommittee seek to have those who attack affirmative action present their views on the nature and extent of the problem of discrimination. Unless there is agreement at this level, it will be difficult, if not impossible, to reach any consensus on remedies.

2. *Discrimination is a self-sustaining process that will persist even in the absence of intentionally discriminatory conduct, unless systematically attacked*

Discrimination is more than just individual prejudice. Although discrimination is maintained by individual actions, neither individual prejudices nor random chance can fully explain the persistence of national patterns of inequality.

In our proposed statement, the Commission discusses the self-sustaining "process" of discrimination. This process involves the attitudes and actions of individuals and organizations, and the social structures that guide individual and organizational behavior. The proposed statement identifies illustrative examples of each level of discriminatory conduct, and describes discrimination as an interlocking, self-perpetuating process that, started by past events, now routinely bestows privileges and advantages upon white males while imposing disadvantages and penalties upon minorities and women.

As our Nation's civil rights laws have recognized, discrimination can include practices that, regardless of their intent or motivation, disadvantage minorities and women. Moreover, discrimination in any one area of human endeavor has reciprocal consequences in other. Thus, discriminatory housing practices perpetuate unequal educational opportunities which are themsleves then translated into unequal employment opportunities. Employment discrimination denies its victims the resources to overcome unfair housing practices and the pattern is repeated.

This understanding of the problem as a discriminatory process forms the basis for affirmative action plans and the particular antidiscrimination measures used by such plans. When such a process is at work, antidiscrimination efforts to eliminate prejudice by insisting on "color-blindness" and "gender-neutrality" are insufficient remedies. At best, such efforts may control some prejudicial conduct, but they often prove ineffective against a process that transforms "neutrality" into discrimination. In such circumstances, antidiscrimination efforts cannot be limited to measures that take no conscious account of race, sex, and national origin. Only those antidiscrimination actions that are developed out of an awareness of this process—affirmative actions—can successfully halt and dismantle it.

3. *Numerical underrepresentation of minorities or women does not itself constitute discrimination. Such statistics are warning signals that strongly suggest the presence of discrimination and compel further inquiry*

Perhaps no other aspect of civil rights law has been more misunderstood then its use of statistics. Our proposed statement devotes considerable attention to their use and abuse.

Statistical procedures interpreting data based on race, sex, and national origin are the principal and best means for detecting the likely presence of discrimination. Their use is premised on the assumption that in the absence of discrimination, minorities and women will be represented throughout an employer's workforce to a degree roughly proportional to their availability in the relevant labor force.

It is important, however, to distinguish statistical indicators of discrimination from discrimination itself. Evidence of statistical underrepresentation of minorities and women provides a starting point from which to examine more closely particular hiring, promotional, or other employment practices to determine whether they are the cause of the unequal results. If they are not, no legal liability arises.

This distinction between unequal results and the processes that produce them is contained within the regulations currently enforcing Executive Order 11246. They require employers to conduct a self-analysis that not only determines any underutilization of minorities and women, but also serves as the basis for the "results-oriented procedures" for dismantling the discriminatory process that produced the unequal results.

The requirement of an initial thorough investigation is not a pro forma exercise by the Federal contract compliance program. It is essential if those personnel practices that promote the statistical profile are to be identified. This sensible approach requires that the party most knowledgeable about employment practices—the employer—be responsible for reviewing them to ascertain those which promote discrimination.

4. Just as numerical evidence is the best available warning signal that discrimination may be occurring, numerical measures, including goals and timetables, are the best available methods for determining whether an action program designed to combat employment discrimination has proved effective

When the self-analysis has been completed and discriminatory practices identified, successful affirmative action requires that an employer then devise a systematic, comprehensive, and reviewable program designed to eliminate the discrimination uncovered. The commission believes that goals, timetables, and specific action programs designed to achieve the stated goals within the selected timetables, are essential components of affirmative action plans.

Goals and timetables are not only appropriate, but necessary, methods for determining the success of implementation. They are routinely employed as administrative tools in various contexts because they are comprehensible and reviewable standards for determining progress. Without goals and timetables, progress towards the desired objective of eliminating discrimination cannot be measured.

Under the Executive Order, goals and timetables need not be inflexible, and failure to achieve specified goals within established timeframes does not necessarily mean that an employer has been derelict in its duties. The failure of good faith efforts to meet the goals or timetables of an affirmative action plan, as with the failure to meet the predetermined goals or timetables of any management plan, requires an evaluation of both the plan and its implementation. It may be that a plan originally thought effective encountered unexpected contingencies. In such a case, the deficiencies can be identified and a new plan devised and implemented. A determination of good faith looks to the entirety of the employer's affirmative action plan, including the thoroughness of the self-analysis, the reasonableness of the plan that was devised to remedy problems disclosed by self-analysis, and the employer's adherence to its plan. Regulations currently governing the Federal contract compliance program fully reflect these principles.

5. Affirmative action plans, and the particular affirmative measures they may use, depend on the nature and extent of the discrimination to be remedied

We are careful to distinguish affirmative action plans from the specific antidiscrimination measures that commonly are parts of such plans. Affirmative action plans are systematic organizational efforts that comprehensively address discriminatory processes through antidiscrimination measures. These measures are specific antidiscrimination techniques that may or may not use race, sex, and national origin as criteria in decisionmaking. This distinction, between affirmative action plans and the antidiscrimination measures that are parts of such plans, is crucial because it permits rigorous support for affirmative action plans while permitting productive discussion of the wisdom of using any particular antidiscrimination measure in a given circumstance.

Antidiscrimination measures can range from extensive recruiting of minorities and women; to revising selection criteria so as not to exclude qualified minorities and women; to assigning a "plus" over and above other factors to qualified minorities and women; to specifying that among qualified applicants a specific percentage or ratio of minorities and women to white males be selected. Whichever particular method may be chosen—and we would emphasize that under the Executive Order it is Federal contractors who get to make this decision in the first instance—depends as a matter of law and policy upon the factual circumstances confronting the organizaton undertaking the remedial actions.

All of these measures, by broadening the field of competition for opportunities, function to decrease the privileges and prospects for success some white males previously, and almost automatically, enjoyed. To criticize any antidiscrimination measure on the ground that it "prefers" certain groups over others ignores the reality confronting organizations. Frequently, the basic choice is between activities that routinely favor white males, or affirmative action plans that work to dismantle the process that presently allocates opportunities in a discriminatory manner. While it is appropriate to debate which antidiscrimination measures affirmative action plans should use under what circumstances, the touchstone of the decision should be how the process of discrimination manifests itself, and which particular measures promise to be the most effectve in dismantling it.

The necessity for and legality of even the most controversial antidiscrimination measures is now established, despite nearly a decade of coordinatd and well-funded assault against their use. In all the Federal Courts of Appeals, it is settled law that the issue is not whether affirmative action may be taken, but when. The Supreme Court has consistently declined to review the numerous Court of Appeals decisions that have ordered quota relief to remedy illegal discrimination or that have approved quota relief as parts of consent decrees. The trilogy of Supreme Court affirmative action cases (*Bakke*, *Weber* and *Fullilove*) makes clear that for most members of the Supreme Court, the legal issue is not whether affirmative action is constitutional, but what antidiscrimination measures are appropriate in which circumstances to remedy what forms of discrimination. In addition, the executive branch has repeatedly sought and bargained for all kinds of antidiscrimination measures under a variety of conditions.

Quotas and other forms of so-called preferential treatment are not panaceas. Their use depends on the ways in which discrimination has occurred and manifests itself. They came into use, and have received such extensive judicial and administrative approval because of the unyielding nature and pervasive extent of discrimination. We urge the subcommittee to keep clearly in mind this distinction between affirmative action plans and the antidiscrimination measures they may use.

The Commission is also deeply interested in the second related issue that is the subject of these hearings, the Federal role in enforcing equal employment opportunity.

The Commission has long monitored the Federal contract compliance program and has criticized ineffective aspects of the enforcement effort. During the period of decentralized enforcement, which did not end until 1978, we found deficiencies in the management of the program, in the instruction and assistance provided contractors, and in the quality of compliance reviews. The program was seriously undermined by poor coordination by the Office of Federal Contract Compliance, by duplicative efforts of the agencies involved, and by minimal attention given to contract compliance efforts by agencies that viewed such efforts as unrelated to their overall missions. Sanctions for violation of the order were rarely imposed. The Office of Federal Contract Compliance was slow to develop policy on such important issues as employee selection procedures, sex discrimination, and retroactive relief.

As the Commission wrote to Secretary Donovan upon his confirmation, we have noted many improvements in the contract compliance program in recent years. A major achievement was the 1978 consolidation of the program into the Department of Labor. The Office of Federal Contract Compliance worked hard to make successful the transformation from regulator of other decentralized regulators to the sole agency responsible for enforcing the Order. The department also sought to change transferred staff members' varied approaches to enforcing the Order into a uniform process. Top Department of Labor officials provided long-needed support and strong leadership in molding the contract compliance efforts into a consistently enforced program. Initiation of a new comprehensive training program, issuance of a compliance manual, and careful development of vital regulations, such as affirmative action procedures, have been essential elements in the recent progress in improving this civil rights function of the Federal Government.

At this time, however, the Commission is becoming increasingly concerned about prospects for a reversal of this progress. Budget reductions in the contract compliance program pose a threat to the ability of the Office of Federal Contract Compliance Programs to carry out its mandated responsibilities. The downgrading of the Employment Standards Administration, of which the contract compliance program is a part, could further reduce enforcement, a concern we conveyed to the new Director of the Office of Federal Contract Compliance, Ellen Shong, upon her appointment. We are also disturbed by recently proposed regulatory changes in the Federal contract compliance effort which, if adopted, would seriously narrow the contract compliance program's scope and weaken its affirmative action requirements.

For example, the Department of Labor is proposing to raise the coverage threshold for developing and maintaining written affirmative action programs and would thus eliminate thousands of contractors from this requirement. Other planned revisions include eliminating preaward review and exempting certain contractors from compliance reviews for as long as five years. In addition, the Department is actively considering making it Office of Federal Contract Compliance Programs policy not to seek backpay for a period longer than two years. If initiated, these proposed revisions would significantly limit enforcement efforts. As you may know, the Equal Employment Opportunity Commission reportedly has raised important substantive objections to some of these proposed changes.

This Commission fully supports regulatory review and reform. This process must not take the guise, however, of stripping civil rights law and its enforcement of authority and credibility.

STATEMENT OF ARTHUR S. FLEMMING, CHAIRMAN, U.S. COMMISSION ON CIVIL RIGHTS, ACCOMPANIED BY JOHN HOPE III, ACTING STAFF DIRECTOR, AND JACK HARTOG, ASSISTANT GENERAL COUNSEL

Mr. **Flemming**. I appreciate your comments. The Commission is very pleased to respond to your request for our testimony before your subcommittee in the course of your oversight hearings on the new administration's policies concerning equal employment opportunity. Accompanying me today on my left is John Hope III, our Acting Staff Director, and on my right, Jack Hartog, Assistant General Counsel and director of our affirmative action project.

As you noted, Mr. Chairman, in your opening comments the Commission recently issued a report entitled "Civil Rights: A National, Not a Special Interest." That document was the basis of Commission testimony to the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee in connection with an oversight hearing conducted by that committee on the possible impact of pending budget proposals on civil rights.

The report reviews the proposed cuts in Federal civil rights enforcement efforts as well as proposed reductions in or elimination of 10 social and economic programs integrally related to civil rights progress. The report also analyzes the proposal to establish a block grant approach in numerous areas.

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In our report we raise the question of whether the pending budget proposals foreshadow another period of retrenchment rather than advancement in the area of civil rights. We are especially concerned about the Federal role in dealing with the effects of past and present discrimination on the lives of minorities.

Our report for example notes that there will be a loss of 697 positions in the five major civil rights enforcement agencies. This reduction, our report concludes, is likely to limit actual enforcement, undercut the deterrent effect of Federal enforcement by diminishing the credibility of potential Federal liability and weaken the ability of the Federal Government to assist those who would voluntarily fulfill their civil rights obligations.

Our report also notes that the budget proposals would completely eliminate or sharply cut Federal programs such as those providing comprehensive employment and training and economic development and small business assistance that are designed to open new opportunities for employment for minorities and women.

The Commission has long held that if we are to combat discrimination in the field of employment effectively, both public and private employers must make the fullest possible use of the management tool that has come to be known as affirmative action. We have also vigorously supported the use of affirmative action as an indispensable part of the enforcement of Executive Order 11246 by the Office of Federal Contract Compliance programs in the Department of Labor. This Presidential program which has been supported by Presidents of both parties requires businesses that contract with the Federal Government not to discriminate and to develop and implement affirmative action programs.

In brief, we believe that employers, public and private, must set goals and timetables for the employment of minorities and women. They must then develop action programs designed to achieve these goals within the specified time frames. These action programs should assign specific duties and responsibilities to appropriate employees and should penalize those who fail to discharge them and reward those who successfully discharge them.

Recently the Commission released and widely circulated a proposed statement "Affirmative Action in the 1980's: Dismantling the Process of Discrimination." Subsequent to releasing the proposed statement the Commission held two public consultations on this document. These consultations provided the Commission an opportunity to receive and consider comments on the proposed statement from a wide range of proponents and critics of affirmative action.

My remarks on affirmative action today are based on this document which the Commission is presently reviewing. With the understanding that this review is likely to produce some modifications, I would like to submit a copy of the proposed statement for inclusion in the record of this hearing.

The following are some of the major points underlying the proposed statement:

First, affirmative action exists because of the nature and extent of the problem of race, sex, and national origin discrimination and can only be discussed productively if the problem of discrimination is recognized.

Because affirmative action by definition means remedial action and to one degree or another deliberately takes race, sex, or national origin into account, it appears at odds with the ideal of a color-blind America that makes decisions without reference to race, sex, or national origin. How can remedial means that consciously use race, sex, or national origin be reconciled with ultimate ends that preclude any consciousness of race, sex, or national origin?

Our proposed statement seeks to make clear that any supposed means-end conflict between affirmative action and eliminating discrimination can be resolved. Such resolution will be found through a more precise understanding of the nature and extent of today's patterns and processes of race, sex, and national origin discrimination.

Abstract, philosophical debates over means and ends, our porposed statement argues, will remain unproductive. Greater agreement is most likely to emerge from a practical, concrete analysis of how the problem of discrimination manifests itself and then of what remedies will most effectively eliminate such discrimination.

It is for this reason that the Commission's proposed statement adopts a problem-remedy approach that continually unites the remedy of affirmative action with the problem of discrimination.

The second point we underline is that discrimination is a self-sustaining process that will persist even in the absence of intentionally discriminatory conduct unless systematically attacked. Discrimination is more than just individual prejudice. Although discrimination is maintained by individual actions, neither individual prejudices nor random chance can fully explain the persistence of national patterns of inequality.

In our proposed statement the Commission discusses the self-sustaining process of discrimination. This process involves the attitudes and actions of individuals and organizations and the social structures that guide individual and organizational behavior. The proposed statement identifies illustrative examples of each level of discriminatory conduct and describes discrimination as an interlocking self-perpetuating process that, started by past events, now routinely bestows privileges and advantages upon white males while imposing disadvantages and penalties upon minorities and women.

The third major point that we underline in the proposed statement is that numerical underrepresentation of minorities or women does not itself constitute discrimination. Such statistics are warning signals that strongly suggest the presence of discrimination and compel further inquiry. Perhaps no other aspect of civil rights law has been more misunderstood than its use of statistics. Our proposed statement devotes considerable attention to their use and abuse.

Statistical procedures interpreting data based on race, sex, and national origin are the principal and best means for detecting the likely presence of discrimination. Their use is premised on the assumption that in the absence of discrimination, minorities and women will be represented throughout an employer's work force to a degree roughly proportional to their availability in the relevant labor force.

It is important, however, to distinguish statistical indicators of discrimination from discrimination itself. Evidence of statistical underrepresentation of minorities and women provides a starting point from which to examine more closely particular hiring, promotional, or other employment practices to determine whether they are the cause of the unequal results. If they are not, no legal liability arises.

This distinction between unequal results and the processes that produce them is contained within the current regulations enforcing Executive Order 11246. They require employers to conduct a self-analysis that not only determines any underutilization of minorities and women but also serves as the basis for the results-oriented procedures for dismantling the discriminatory process that produced the unequal results.

The fourth major point that we underline in our statement is that just as numerical evidence is the best available warning signal that discrimination may be occurring, numerical measures, including those in timetables, are the best available methods for determining whether an action program designed to combat employment discrimination has proved effective.

When the self-analysis has been completed and discriminatory practices identified, successful affirmative action requires that an employer then devise a systematic comprehensive and reviewable program designed to eliminate the discrimination uncovered. The Commission believes the goals, timetables and specific action programs designed to achieve the stated goals within the selected timetables are essential components of affirmative action plans.

Under the Executive order, goals and timetables need not be inflexible, and failure to achieve specified goals within established time frames does not necessarily mean that an employer has been derelict in its duties. The failure of good faith efforts to meet the goals or timetables of an affirmative action plan, as with the failure to meet the predetermined goals or timetables of any management plan, requires an evaluation of both the plan and its implementation.

Our fifth point that we underline in our statement is that affirmative action plans and the particular affirmative measures they may use depend on the nature and extent of the discrimination to be remedied. We are careful to distinguish affirmative action plans from the specific antidiscrimination measures that commonly are parts of such plans.

Affirmative action plans are systematic organizational efforts that comprehensively address discriminatory processes through antidiscrimination measures. These measures are specific antidiscrimination techniques that may or may not use race, sex, and national origin as criteria in decisionmaking. This distinction between affirmative action plans and the antidiscrimination measures that are parts of such plans is crucial because it permits rigorous support for affirmative action plans while permitting productive discussion of the wisdom of using any particular antidiscrimination measure in a given circumstance.

Antidiscrimination measures can range from extensive recruiting of minorities and women to revising selection criteria so as not to exclude qualified minorities and women to assigning a plus over and above other factors to qualified minorities and women to specifying that among qualified applicants a specific percentage or ratio of minorities and women to white males be selected.

Whichever particular method may be chosen—and we would emphasize that under the Executive order it is Federal contractors who get to make this decision in the first instance—depends as a matter of law and policy upon the factual circumstances confronting the organization undertaking the remedial actions.

All of these measures, by broadening the field of competition for opportunities, function to decrease the privileges and prospects for success some white males previously and almost automatically enjoyed. To criticize any antidiscrimination measure on the ground that it prefers certain groups over others ignores the reality confronting organizations. Frequently the basic choice is between activities that routinely favor white males or affirmative action plans that work to dismantle the process that presently allocates opportunities in a discriminatory manner.

While it is appropriate to debate which antidiscrimination measure affirmative action plans should use under what circumstances, the touchstone of the decision should be how the process of discrimination manifests itself and which particular measures promise to be the most effective in dismantling it.

The necessity for and legality of even the most controversial antidiscrimination measure is now established despite nearly a decade of coordinated and well funded assaults against their use. In all of the Federal Courts of Appeals it is settled law that the issue is not whether affirmative action may be taken but when. The Supreme Court has consistently declined to review the numerous Court of Appeals decisions that have ordered quota relief to remedy illegal discrimination or that have approved quota relief as part of consent decrees.

The trilogy of Supreme Court affirmative action cases, *Bakke, Weber,* and *Fullilove,* makes clear that for most members of the Supreme Court the legal issue is not whether affirmative action is constitutional but what antidiscrimination measures are appropriate in which circumstances to remedy what forms of discrimination.

The Commission is also deeply interested in the second related issue that is the subject of these hearings: the Federal role in enforcing equal employment opportunity. The Commission has long monitored the Federal contract compliance program and has criticized ineffective aspects of the enforcement effort.

During the period of decentralized enforcement which did not end until 1978, we found deficiencies in the management of the program, in the instruction and assistance provided contractors and in the quality of compliance reviews. The program was seriously undermined by poor coordination by the Office of Federal Contract Compliance, by duplicative efforts of the agencies involved and by minimal attention given to contract compliance efforts by agencies that viewed such efforts as unrelated to their overall missions. Sanctions for violation of the order were rarely imposed. The Office of Federal Contract Compliance was slow to develop policy on such important issues as employee selection procedures, sex discrimination, and retroactive relief.

As the Commission wrote to Secretary Donovan upon his confirmation, we have noted many improvements in the contract compliance program in recent years. A major achievement was the 1978 consolidation of the program into the Department of Labor. The Office of Federal Contract Compliance worked hard to make successful the transformation from regulator of other decentralized regulators to the sole agency responsible for enforcing the order. The Department also sought to change transferred staff members' varied approaches to enforcing the order into a uniform process. Top Department of Labor officials provided long-needed support and strong leadership in molding the contract compliance efforts into a consistently enforced program. Initiation of a new comprehensive training program, issuance of a compliance manual and careful development of vital regulations such as affirmative action procedures have been essential elements in the recent progress in improving this civil rights function of the Federal Goverment.

At this time, however, the Commission is becoming increasingly concerned about prospects for a reversal of this progress. Budget reductions in the contract compliance program, as I have already noted, pose a threat to the ability of the Office of Federal Contract Compliance Programs to carry out its mandated responsibilities.

The downgrading of the Employment Standards Administration of which the contract compliance program is a part could further reduce enforcement, a concern we conveyed to the new Director of the Office of Federal Contract Compliance Programs, Ellen Shong, upon her appointment. We are also disturbed by recently proposed regulatory changes in the Federal contract compliance effort which, if adopted, would seriously narrow the contract compliance program's scope and weaken its affirmative action requirements.

For example, the Department of Labor is proposing to raise the coverage threshold for developing and maintaining written affirmative action programs and would thus eliminate thousands of contractors from this requirement. Other planned revisions include eliminating preaward review and exempting certain contractors from compliance reviews for as long as 5 years. In addition, the Department is actively considering making its Office of Federal Contract Compliance Programs adhere to a policy of not seeking backpay for a period longer than 2 years. If initiated, these proposed revisions would significantly limit enforcement efforts. As you may know, the Equal Employment Opportunity Commission reportedly has raised important substantive objections to some of these proposed changes.

This Commission fully supports regulatory review and reform. This process must not take the guise, however, of stripping civil rights law and its enforcement of authority and credibility.

I will be very happy, Mr. Chairman, to try to respond to your questions or questions of members of the committee.

Mr. HAWKINS. Thank you, Mr. Flemming, for your very excellent statement.

Mrs. Fenwick, we will yield to you first this time.

Mrs. FENWICK. Thank you, Mr. Chairman.

It has been a long time since I left the New Jersey committee for your Commission, but I served on it from the beginning and was vice chairman under your predecessor. Much good work was done.

I wanted to ask you something. I have long had a hope and belief that one of the most effective things we could do would be to require that every single Government agency—and we would have the right to do that in an executive agency—should compose a team of people in various occupations in that particular agency to go into our high schools in our central cities and other places and inform the children of the requirements of each occupation and to encourage them to go into that particular field.

For example I have in mind a truck driver, a lawyer, a nurse, an accountant, a chemist, a doctor if there is any. In other words all the variety and gamut of occupations, and by the composition of the team it would indicate that these occupations are open to all. I would like companies to do it as well. If we could organize night tutoring, after-school tutoring and after-work tutoring through this mechanism, those children in the high schools who wanted to go on to the occupations that have been suggested could sign up. If medicine interests one, well, when a doctor explained his profession, he would have told the students that you have to be good in chemistry and biology and English.

Do you see what I mean? How would something like that strike you as an evidence of practical evidence, a concern? I would like to see every company do it.

Mr. FLEMMING. Congresswoman Fenwick, in connection with some of the desegregation plans that have been put into operation in some of the cities, business concerns have adopted certain schools within those cities. For example this has been done in Boston. The fact of the matter is Judge Garrity, the Federal judge who is responsible for the desegregation order there, has included that in his plans. Those business concerns have carried on activities along the line that you have identified.

I think that it would be possible, for example, for each Federal regional council to accept responsibility for developing a program with the relevant Federal agencies in an area such as Boston—taking that again as an illustration—to develop comparable relationships with the schools in that particular area.

Mrs. FENWICK. I have not made myself clear. I know of some of these business relationships. They get the guidance counselors to come in and observe and monitor a job interview, so that the guidance counselors are able when working with the children to advise them. That is not what I mean.

You have to move directly to the children. You have to by visual evidence convince those children that these occupations are open to male, female, Hispanic, black, or white. I do not see any reason why Government employees should not do it. They are all paid employees of the taxpayers, and I see no reason why they should not, in cooperation with the schools, move in this direction.

Mr. FLEMMING. I think you have a very interesting idea and I think it is an idea that could be worked on and developed from a practical point of view, both in terms of the private sector and the public sector.

Mrs. FENWICK. Are there any other ideas that you might have? I know the fine program that Prudential is doing in Newark and I am told that it is good. But it is not enough, because it is not enough to just let the teachers see it. The children have to see it.

Mr. FLEMMING. I think basically it is a sound approach.

Mrs. FENWICK. Thank you.

Thank you, Mr. Chairman.

Mr. HAWKINS. Thank you, Mrs. Fenwick.

Mr. Clay?

Mr. CLAY. Thank you, Mr. Chairman.

Mr. Flemming, in the Commission's report captioned "Civil Rights, a National Not a Special Interest" just recently issued you stated, and I quote:

> There is a grave danger that this administration's efforts to balance the budget, cut taxes, and expand the defenses of the Nation may diminish or undercut the Federal Government's responsibility or its capacity to fulfill that responsibility to preserve, protect and defend the constitutional rights of all Americans.

What, in your view, are some of the likely ramifications of this administration's apparent decision not to support the adequate funding programs responsible for the enforcement of equal opportunity laws?

Mr. FLEMMING. Congressman Clay, the generalized statement which you have quoted from our report is based on a rather detailed analysis of the budget proposals first of all as they relate to the civil rights enforcement agencies. Chapter 3 of the report deals with the Federal civil rights enforcement effort. In that particular chapter we analyze the budget proposals for each one of the enforcement agencies. Then having analyzed the budget proposals for each one of them, we do arrive at a conclusion which we set forth on page 47.

There we state that our review of five major civil rights enforcement programs indicates that the administration's proposed reductions in their budgets would jeopardize recent efforts to improve Federal civil rights enforcement activities. The revisions threaten a significant decrease in Federal civil rights enforcement efforts—a decrease that may have long term consequences in terms of the ability of the Nation to implement its constitutional commitment to equal opportunity.

The reduction in Federal civil rights enforcement resources for these five agencies, the loss of 697 positions from 7,400 in fiscal 1981 to 6,700 in fiscal 1982 is likely to limit actual enforcement, undercut the deterrent effect of such enforcement by diminishing the credibility of potential Federal liability and reduce technical assistance for those who would undertake self-improvement and voluntary compliance with civil rights obligations.

But we did not confine our analysis to the civil rights enforcement agencies. In addition, we took a look at the proposed reductions in social and economic programs which in our judgment are directly related to the Federal Government's obligation to deal with the results of discrimination, both past discrimination and present discrimination.

We looked at the budget proposals in connection with the Legal Services Corporation, the Elementary and Secondary Education Act, the Emergency School Aid Act, the Bilingual Education Act, the Small Business Administration programs, the Economic Development Administration, the federally assisted housing programs, community health centers, Comprehensive Employment Training Act, the Community Service Administration.

Having looked at proposed reductions for each one of the programs, we reached some overall conclusions. I will just read the final paragraph of our conclusions:

> The budget reductions for or abolition of programs proposed by the administration will pose barriers to the fulfillment of the constitutional promise of equality embodied in the Civil War amendments and will limit the ability of those programs to attain the congressional objectives of the specific legislation. As past Congresses have realized in their deliberations over these programs, the solution to achieve the Federal mandate of both the Civil War amendments and the program's specific legislation is to make these programs effective or replace them with programs that promise greater effectiveness.

In our judgment the Civil War amendments place upon the Federal Government an obligation not to turn its back on programs designed to deal with the results of discrimination. And to put it positively, they place upon the Federal Government an obligation to open up opportunities that are designed to be responsive to past and present discrimination plans.

Mr. CLAY. In your testimony you describe affirmative action as a management tool. Will you briefly explain to the committee what you mean by that?

Mr. FLEMMING. It seems to me that if a person has a responsibility for managing an organization, he or she is going to set some objectives for that organization and she or he is going to soon learn that just setting the objectives and telling the organization about the objectives is not going to accomplish very much. In addition to setting the objectives, it is going to be necessary to set some measurable goals related to the achievement of a given objective and to establish a timetable for reaching those goals.

Then it is necessary to develop an action program which will make it possible, hopefully, to reach the goal within the time set. One of the characteristics of the action program is that you assign duties and responsibilities to people in the organization to do certain things which, if done, will make it possible to reach the goal. You penalize those who do not discharge those duties and responsibilities and you reward those who do.

Now as we see it, the objective of equal employment, the opening up opportunities for minorities and women, should be an objective of all organizations, public or private. And if the administrator of an organization, the person who has topside responsibility for the organization really means business in setting that objective, if she or he is going to do more than just pay lip service to the objective, then of necessity she or he is going to use this management tool.

The administrator is going to set some goals in the area of equal opportunity and is going to set some timetables. She or he is going to have an action program and is going to assign duties and responsibilities to people in the organization. The administrator is going to penalize those who do not discharge those duties. She or he is going to reward those who do.

If the administrator does this, she or he will begin to get results.

If I have top responsibility for a Federal agency or for an educational institution—and I have had the privilege of having responsibility for both types of institutions in the past—I can talk all I want to about wanting to open up opportunities for minorities and women, and the people associated with my organization will listen to me. But nothing will really happen because built into my organization, like all other organizations, will be institutional discrimination.

Nothing really is going to happen until I finally get down to business and set some goals, some timetables, develop an action program, assign duties and responsibilities to people, and make it clear that I am going to reward those who discharge those duties and responsibilities effectively and I am going to penalize those who do not. Then I will begin to get some results. Then I will be able to overcome this institutional discrimination that is built into my organization.

This updated statement on affirmative action that the Commission is about to issue to which I referred in my testimony places a great deal of emphasis on the fact that you develop an affirmative action plan which is tailored to the kind of discrimination that is being practiced within your organization at any given time. So it becomes a management tool, a management tool that helps you to deal with the issue of discrimination as it manifests itself within your particular organization.

Mr. CLAY. Thank you, Mr. Chairman.

Mr. HAWKINS. Mr. Petri?

Mr. PETRI. I yield to Mrs. Fenwick.

Mrs. FENWICK. Again I have just a small matter. Are you responsibile for form M-1? No? Who does that?

A small businessman sent it to me. Twenty-two different groups have to be identified in this, including Aleuts and Eskimos. It is not from your office, right?

Mr. FLEMMING. No; I will be glad to check it for you.

Mrs. FENWICK. It is form M-1. The employer was desperate. I think there were actually 26 different groups in all. He said, "What do I do if someone is half and half."

Mr. FLEMMING. We will be glad to check into that.

Mrs. FENWICK. Thank you.

Mr. PETRI. That relates to my question. I notice on page 5 in your testimony you indicated that a concrete analysis of remedies will most effectively eliminate discrimination, and that getting down to the practical aspects of the problem is the way to get something done rather than just talking about the problem in general terms.

Are there additional categories that should be the subject of affirmative action that have been added to this list of 26?

Mr. FLEMMING. Our statement, as you indicate and it is reflected in my testimony, places great emphasis on the fact that you take a look at a specific situation for the purpose of determining whether or not the members of a group within a particular organization are really the victims of discriminatory practices. We feel that you should deal with it on a case-by-case basis. We believe that the problem-remedy approach that is set forth in our proposed statement on affirmative action makes a lot of sense. You analyze your problem. You determine what your problem is.

As I have said in response to Congressman Clay, if I have responsibility for the administration of a Government agency or an educational institution, if I analyze my problem in the area of equal employment, I am going to conclude without any difficulty that I have got some problems in terms of both past and present discrimination against members of the black community in all probability. It would be very unusual if I did not reach that particular conclusion. Likewise, I will reach that conclusion undoubtedly in connection with the Hispanic community, the Asian-American community, and the American Indian community.

Now I appreciate the thrust of your question as to whether or not there are members of certain other groups that are discriminated against because they are members of the groups. But I think what you do is to analyze your problem to determine whether or not there is evidence pointing to the fact that members of a group are the victims of discrimination. If there is that problem, then you devise a remedy in the form of an affirmative action plan of some kind designed to deal with that particular problem.

Mr. **Hawkins**. Mr. Flemming, I hate to interrupt but there is a vote pending on the floor. Two bells did ring. I would suggest that we take a brief recess, 10 minutes, not longer. Then we will continue the questioning. The vote is on the Department of Defense authorization bill regarding the use of Defense personnel for drug arrests.

The subcommittee is in recess for 10 minutes.

[Recess was taken.]

Mr. **Hawkins**. The subcommittee will come to order.

Mr. Flemming, I apologize again. The 10-minute recess was extended because another vote was pending, but apparently we are not that close to it and we wanted to accommodate you and your time schedule.

Mr. Washington, I think you are next in line.

Mr. **Washington**. Thank you, Mr. Chairman.

Directing your attention to page 5 of your statement, Mr. Flemming, at the bottom of the page you state: "Discrimination is a self-sustaining process that will persist even in the absence of intentionally dicriminatory conduct unless systematically attacked."

One of the criticisms of the affirmative action process today is that it has come to mean something different from its stated goal of equal opportunity for all. Through the use of goals and quotas, affirmative action has come to mean equality of results, the presumption that every selection process must result in a one-to-one match between the race, gender, and ethnic opposition and the application pool and the candidates selected.

How do you respond to this criticism of affirmative action? It is a misconception of course. It is devastating in its use and it has got to be met head on.

Mr. **Flemming**. It is a misconception. In our basic statement to which I referred in our testimony we endeavor to deal with that in depth. I go back again to the fact that we believe that the affirmative action plan should be in direct response to the fact of discrimination as it exists within an organization, private or public as far as that is concerned.

As I indicated in my testimony we agree with the current regulations as far as the Executive order is concerned in that they require an analysis of the work force in order not just to come up with a set of statistics but for the purpose of determining whether discrimination exists and the extent of discrimination in that particular organization.

Then goals and timetables should be set for that particular organization for the purpose of remedying the past and present discrimination that is reflected in that particular organization. You do that employer by employer, public and private employer, one after the other. It is not an effort to impose a formula on the entire Nation or anything of that kind. I mean a statistical formula on the entire Nation. It is an effort to analyze what the problem is in a particular organization.

As I indicated in response to an earlier question, if you analyze it frankly, you identify the fact that the organization is confronted with the results of past and present discrimination. Then you, as an administrator if you have responsibility for that organization, develop a plan designed to deal with it. It just makes sense to set some goals and some timetables.

But the most important thing is that you develop action programs designed to reach those goals and you assign responsibilities to people in the organization and you reward those who discharge those responsibilities, you penalize those who do not and step by step you begin to get results. You begin to root out the results of past and present discrimination.

That is the objective of affirmative action. Some of this other language that is used by the opponents is simply an effort to use code words on the part of persons who in reality do not want to combat discrimination. They want to live with the results of it. They do not want to disturb the status quo.

Mr. WASHINGTON. Is the tempo of the times such that the conservative element seems to be gaining some sway? Although I do not think it is a mandate, is it so deepseated that we simply cannot communicate what you are saying here very lucidly? Are we losing the public relations fight? How can we get this across?

There are a lot of people who do not concede your basic point in No. 1 and that is that there is a problem. They do not see it.

Mr. FLEMMING. No; I do not think we should assume that we are losing or that we have to lose what you refer to as the public relations battle. It seems to me that we have got to keep bringing out on top of the table the facts that make it very clear that discrimination does exist.

For example, our Commission put out a couple of years ago a publication called "Social Indicators of Equality." In the area of employment the indicator was the wide gap in the unemployment rate of minorities and women as over against white males. This came out initially in 1978. We pointed out at that time that the gap that had existed in 1960 still existed in 1978, the same gap. We updated that in 1979. There was no change.

Now it has not been updated since then but I am sure there has not been any substantial change. I always hasten to say that that does not mean that minorities and women have not had opportunities for employment over that span of time. But what I am talking about is the gap in the unemployment rate between minorities and women and white males. That gap has remained the same over a period of 20 years. In our judgment it has remained the same because of the fact that discrimination continues to be built into the life of organizations, both public and private.

In our affirmative action statement I think maybe one of the contributions that we are making is the fact that we try to focus on the fact that you have to come to grips with institutional discrimination, with the discrimination in that organization. As I said earlier, as an administrator I may not be in favor of discrimination. I may be in favor of opening up equal employment opportunity. But if I just say that and do not do anything more, if I do not develop and put into effect and get back an affirmative action plan, the organization will beat me because there is built into the organization the results of past and present discrimination.

I think we have to keep working away at that and not give up on it. Fortunately as I indicated in my testimony, at least up to the present point we have had the support of the courts on this and I see no reason why that should not continue.

In fact, if I may just say this, personally I have the feeling that the time has come when we should try in this employment area to introduce at the community level what I refer to as a communitywide affirmative action program. I would like to see a community identify the gap between the unemployment rate of minorities and women and white males. And I would like to see the power structure of that community, both public and private, say we are going to close that gap over the next year or so by 2 or 3 percentage points, whatever the case may be. And in order to close it we are going to develop and launch an action program in our community in behalf of equal employment.

As a part of that action program I would like to see them say we are going to get back to the enforcement of equal employment laws at the Federal, State, and local levels. Also the program should call for carrying on a crusade to get more and more employers to develop and implement affirmative action plans. It should recognize that in all probability small businesses are the largest single employer in our community, and should make it possible for small business to be serviced by a central affirmative action staff. The media should be urged to get behind the plan. Sponsors of the plan should try to develop some pride in the community in making progress in closing the gap between the unemployment rate of minorities and women and white males.

I think those are the kinds of things that we have to do instead of just spending too much of our time dealing with these code words that people throw at us who do not really believe in equal opportunity anyhow. We have to get on the offensive.

I would really like to see some people get interested in some communitywide affirmative action programs.

Mr. WASHINGTON. Your positive position is encouraging. Perhaps these hearings the chairman has scheduled will help launch the kind of thing you are talking about. At least I am optimistic to the extent that we should try.

Mr. FLEMMING. Personally I am delighted that these hearings have been scheduled.

Mr. WASHINGTON. I yield, Mr. Chairman.

Mr. HAWKINS. Because of the constraint of time, Mr. Flemming—I understand that you are hard pressed—the Chair will refrain from questions at this time. This is the first in a series of hearings, and we will take advantage of your generosity by inviting you back some other time.

Mr. FLEMMING. Mr. Chairman, we are just delighted you are doing this. We will be more than happy to work with you and with the members of your staff, and I will be glad to come back at any time. We believe in the objectives that you believe in and we want to do everything we can to help make it possible for our Nation to move forward rather than backward in the achievement of the objectives.

Mr. HAWKINS. Thank you, and thanks for the very constructive suggestions you have made this morning. We have noted them and we will certainly be in constant communication with you and your staff.

Mr. **Flemming**. Thank you very much.

Mr. **Hawkins**. Thank you.

[The Commission report to be retained in subcommittee files is also available at the Commission on Civil Rights.]

Mr. **Hawkins**. The next scheduled witness is Ms. Vilma Martinez, president and general counsel of the Mexican American Legal Defense and Educational Fund.

Ms. Martinez, we welcome you as our next witness and look forward to your testimony.

All of the testimony of the witnesses will be incorporated in the record in its entirety. We might suggest to the witnesses that they simply deal with the highlights of their testimony.

Ms. Martinez, you may proceed.

Ms. **Martinez**. Thank you, Mr. Chairman.

[The prepared statement of Vilma Martinez follows:]

PREPARED STATEMENT OF VILMA S. MARTINEZ, PRESIDENT AND GENERAL COUNSEL, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

My name is Vilma S. Martinez, and I am President and General Counsel of the Mexican American Legal Defense and Educational Fund. MALDEF is a national civil rights organization dedicated to the preservation and vindication of the civil and constitutional rights of close to 15 million Americans of Hispanic descent. Currently, we have offices in San Francisco, Los Angeles, Denver, Chicago, San Antonio and here in Washington, D.C. For the past several years, much of our work has been concentrated in the areas of employment, education, immigration and voting rights. Given the nature of our work, we are keenly aware of the significance of the issues before this subcommittee today and appreciate the opportunity to testify at these hearings.

There is growing opposition to affirmative action--fueled by a lack of understanding of what affirmative action is and why affirmative measures are necessary to integrate our national work force and educational institutions.

As the economy worsens and Americans fear more for their own economic survival, all sorts of epithets are aimed at programs providing access to minorities. Legislative, regulatory and constitutional proposals opposing affirmative action have emerged to threaten the future access of minorities and women into our institutions which, even today, 17 years after the Civil Rights Act of 1964 was enacted, remain the bastion of white America.

We are deeply concerned that support for affirmative action at the federal level is wavering in face of the onslaught by employers arguing that affirmative action is burdensome, expensive and divisive. Affirmative action is an essential tool in the national effort to provide true equal employment and educational opportunity for members of groups to whom it has been denied in the past.

We oppose any weakening of our national commitment to equal opportunities for minorities and women. Specifically, we oppose the current proposals to amend or alter Executive Order 11246[1], amend the Civil Rights Act of 1964[2], and amend the Constitution to prohibit affirmative action. These proposals threaten to undermine the gains made by minorities and women in recent years and are a smokescreen covering what are essentially efforts to return to old, racist modes of behavior.

I. AFFIRMATIVE ACTION.

Affirmative action quite clearly is a matter which directly or indirectly affects the life of virtually every American. Yet despite its pervasive impact, it is a concept which is widely misunderstood. In the final analysis, affirmative action is a collection of race and sex conscious remedies designed to ensure that otherwise fully qualified minorities are allowed to participate in those institutions in our society which have historically been closed to them.

Affirmative action implicitly or explicitly uses race, sex and national origin as criteria in decision making. The particular affirmative measures used by a school or employer clearly depend on the nature and extent of the discrimination to be remedied. We should be clear that affirmative action is not a system of inflexible quotas or other mechanical formulae designed to give preference to minority or female candidates regardless of their qualifications; affirmative action is not a series of requirements which is arbitrarily imposed upon employers and educational institutions without regard to their past history vis-à-vis minorities and women. Rather, it is fundamentally a remedy to redress the continuing effects of past discrimination--a temporary measure to compensate for past evils--and

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[1] Executive Order 11246 (1965), 41 C.F.R. Part 60.

[2] 42 U.S.C. §2000e *et seq*.

employers or educational institutions which have a balanced and representative work force or student body need not engage in affirmative action efforts. Further, the need for affirmative action is triggered by the presence of discrimination or its ongoing effects.

From all indicators, discrimination against minorities and women has not been eliminated from our institutions. Clearly, the current regulatory, legislative and constitutional proposals to eliminate or hobble affirmative action are not the result of our national discrimination problem having been resolved but, rather, have come about because we are entering an era of diminished resources, high unemployment, and increased competition for employment and education. In this atmosphere, it is not surprising that active consideration of race or sex as a positive factor for minority or female candidates has been viewed with trepidation by those who cannot claim protected status. But it is surprising that so many people have adopted the mistaken view that remedial action resulting in wider, fairer competition for scarce opportunities is detrimental to our social welfare.

I am convinced that without the affirmative action requirements contained in federal laws, the participation of minorities and women would be but a fraction of their current numbers in our society. The legality of race and sex conscious remedies which have led to the integration of minorities and women into our institutions can no longer be questioned. The United States Supreme Court has consistently held that the consideration of race or ethnicity as one of many factors in the selection process is permissible.[3] Despite its indisputable legality, however, affirmative action continues to be the subject of considerable controversy. Its detractors allege that it is inconsistent with the fundamental principles of American society; that its implementation is far too costly; that it only results in "reverse racism" against White males. None of these arguments, however, will withstand close intellectual scrutiny.

II. THE UNPERSUASIVE ARGUMENTS AGAINST AFFIRMATIVE ACTION: "PREFERENTIAL TREATMENT" AND "REVERSE DISCRIMINATION".

Those who decry the current use of affirmative action measures fail to comprehend the impact that hundreds of years of discrimination have had on minorities, women and our institutions. Affirmative measures actually try to change a status quo that systematically disfavors minorities and women to an open system that provides them with equal opportunities. The elimination of affirmative action would return us not to a mythical world where all were judged equally, but rather to the actual American past in which minorities and women were always under severe disadvantage in obtaining positions in employment and education.

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[3] For example, in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), the Court held that although Title VI of the 1964 Civil Rights Act does not permit the use of racial or ethnic quotas in the admissions policies of a state-operated medical school, that statute and the Constitution do permit the consideration of race or ethnicity as one of many factors in the admissions process. In *United States Steelworkers* v. *Weber*, 443 U.S. 193 (1979), the Supreme Court went even further, holding that racial and ethnic quotas were permissible under Title VII of the 1964 Civil Rights Act where they were used in a manner which promoted the integration of an employer's work force. Most recently, in *Fullilove* v. *Klutznick*, the Court upheld the constitutionality of a provision of the Public Works Employment Act which provided that at least 10% of federal funds granted for local public works must be used by state or local grantees to procure services or supplies from minority owned businesses.

Affirmative action is not preferential treatment. Senator Orrin Hatch at hearings on his proposed Constitutional amendment has incorrectly defined affirmative action as "policies and programs which accord preferential treatment to individuals based upon their race, color, sex or national origin". The term "preferential treatment" implies an unfairness in the selection process and fails to address the fact that affirmative action is needed to revise a process that allocates opportunities discriminatorily. In truth, "preferential treatment" is not what minorities and women now receive, but what white males almost always did receive in the past.

If affirmative action were truly "preferential treatment" amounting to discrimination against white males, the lessened opportunities for this group would be accompanied by prejudice or bigotry against them, as it always was for black, Hispanic, and female workers. This is clearly not the case: no one argues that white men are physically, intellectually, or morally incapable of holding responsible positions. The Supreme Court has explicitly rejected the argument that action to rectify past discrimination against minorities can be denied in order to preserve white workers' expectations based on past discrimination.[4] Courts have avoided penalizing white male workers who were not responsible for the challenged discrimination. Further, voluntary affirmative action programs upheld by the Supreme Court have benefitted whites as well as minorities.[5]

Affirmative action has been attacked by its opponents as being "reverse discrimination". This fails to take into consideration that affirmative measures are only appropriate where there is a clear underrepresentation of minorities or women and where white males generally hold advantageous positions. Affirmative action does not seek to establish a system of superiority for minorities and women or to stigmatize white males. On the contrary, affirmative action is an attempt to alter a process which has historically favored white males and stigmatized others. Once again, let me emphasize that affirmative action is a temporary process and the need for it ends when the discriminatory process ends. White males are quick to protest that they should not be penalized for oppression wreaked upon minorities by their grandparents or the grandparents of others, but they are not as quick to recognize that they continue to benefit daily from those past acts of oppression. Stripped of its rhetoric, the "reverse discrimination" theme is basically a protest against being forced to compete, on a fair basis, with members of groups that have in the past been excluded from the competition because of their race or sex.

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[4] Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).

[5] United States Steelworkers of America v. Weber, 443 U.S. 193 (1979), where an employer's voluntary affirmative action training program, directed at improving the skills of 50% white employees and 50% black employees, was upheld by the U.S. Supreme Court.

This country has indeed experienced a long period when invidious racial, ethnic, and sex-based quotas overrode individual qualifications. That period began to come to an end in the 1960's. During that period, the quota was zero--or close to it--for blacks, Hispanics, and in many cases women, and not so many years earlier similar maximum quotas applied to Asians, Jews, and other national origin minority groups. Affirmative action seeks to reverse the damage done to our society by quotas of the past not by imposing like restrictions on white males' opportunities, but by lifting arbitrary barriers to utilization of talents that have been not merely overlooked but systematically suppressed. As Justice Blackmun aptly wrote in the Bakke decision,

> It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning...have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largesse on the institutions, and to those having connections with celebrities, the famous, and the powerful.[6]

III. AFFIRMATIVE ACTION GAINS.

The most significant shortcoming of the critics of affirmative action lies not in the illogical substance of their arguments, but in their apparent inability to see the long-range societal benefits of race and sex conscious remedies. Although in some cases imperfect, affirmative action programs have become a valuable tool in our efforts to build a fully integrated society. For example, in a study of affirmative action in admissions at the University of California at Santa Barbara, Chicano sociologist David Leon found that in 1965, the number of Blacks and Chicanos on that campus could be counted on the fingers of one hand. By the 1979-1980 fiscal year, however, 1,159 minority students, or over 7.4% of all undergraduates on that campus, had entered the institution through its special admissions program. Similarly, affirmative action programs launched in 1974 to improve the representation of Hispanics in California state employment have had significant effects. In that year, Hispanics comprised less than 5% of California's state employees. The latest census, however, shows that Hispanics now comprise roughly 9.1% of such state employees (still far below their 20% of California's population or 17% of California's work force).

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[6] 438 U.S. at 404.

Although these gains may appear modest, their value should not be underestimated. Affirmative action has resulted in numerous social benefits due to increased numbers of minority group members in the work force. For example, minority workers in public-contact or public impact positions have increased the availability of linguistically competent and culturally sensitive public service workers and contact workers in private industry. They have acted as role models for minority youth and have allowed employers to obtain a diversity of experience and viewpoint within the work force. Through mechanisms such as affirmative action, Hispanics and other minority group members have been given a stake in this nation's societal institutions. One need only recall that violence and turmoil which rocked the inner cities of this nation during the late 1960's to comprehend that such a stake is vital not only to the well-being of our minority communities but to the welfare of our nation as a whole.

IV. CONTINUED NEED FOR AFFIRMATIVE ACTION.

Even if one choses, however, to ignore these long-range benefits, it is clear that affirmative action must remain a viable concept so long as racism and discrimination continue to plague our society, and until the wounds they leave have completely healed. As previously mentioned, affirmative action is primarily designed to remedy those societal ills, addressing them on both an individual and an institutional level. As long as these problems persist, we see no basis for asserting that the time for race and sex conscious remedies has passed. Once again Justice Blackmun makes my point eloquently:

> I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must

> first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.[7]

Clearly, for this nation's Mexican American people, that moment, when "persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history"[8] has not yet arrived. The tradition of prejudice and discrimination against persons of Mexican American descent is deeply-rooted throughout the Southwest. As the Supreme Court's decisions in Hernandez v. Texas[9] and Castaneda v. Partida[10] and a U.S. Commission on Civil Rights study[11] make abundantly clear, systemic discrimination against Mexican Americans in selection of jurors and all aspects of the administration of justice has long been the rule. Similarly, segregation in public accommodations and facilities has also been commonplace.

In employment, discrimination has equally been pervasive. For example, from the 1870's until the 1960's, copper mining companies in Arizona classified laborers of Mexican origin as "Mexican labor" and paid them uniformly lower wages than those paid to their white counterparts. A 1930 study conducted in California found that jobs in which Mexican Americans tended to be employed were primarily seasonal in nature, had little potential for advancement, and were largely in undesirable locations. The large number of federal and private actions now pending under Title VII on behalf of Mexican American workers shows that similar discrimination practices continue today.

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[7] Regents of the Univ. of California v. Bakke, 438 U.S. at 407.

[8] Bakke, 438 U.S. at 403 (Justice Blackmun).

[9] 347 U.S. 475 (1954). There the Court remarked:

> For many years, children of Mexican descent were required to attend segregated school for the first four grades; that at least one local restaurant prominently displayed a sign announcing 'No Mexicans Served'; and that on the court house grounds, there were two men's toilets, one unmarked and the other marked 'Colored Men' and 'Hombres Aqui.'

[10] 430 U.S. 482 (1977).

[11] See p. 10.

Educational discrimination has also been an accepted fact of life. For example, Mexican American children, until relatively recently, were educated in separate and inferior "Mexican schools". A 1948 report by the Mexican Chamber of Commerce of Harlingen, Texas, describes one such Mexican school as characterized by broken windows, rooms without light, three inch cracks in the side of the building, and loose ceilings "just about ready to fall". Additionally, public schools throughout the Southwest did little to adjust to the limited English language skills of many of their Mexican American pupils. The inferiority of Mexican American education in the Southwest is not just a historical relic, but a recent and, in many instances, a present reality.[12] Federal courts have recently found such segregation in dozens of localities across the state of Texas, including Austin[13], El Paso[14], Corpus Christi[15], Waco[16], Lubbock[17], Midland[18], Uvalde[19], and Del Rio[20]. Just in this past year, a federal judge who surveyed

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[11] "Mexican Americans and the Administration of Justice in the Southwest", United States Commission on Civil Rights, March 1980.

[12] See United States v. State of Texas (Bilingual Education), 506 F. Supp.405 (E.D. Tex. 1981).

[13] United States v. Texas Education Agency (Austin I.S.D.), 564 F.2d 162 (5th Cir. 1977), cert. denied 443 U.S. 915 (1979).

[14] Alvarado v. El Paso I.S.D., 593 F.2d 577 (5th Cir. 1979).

[15] Cisneros v. Corpus Christi I.S.D., 467 F.2d 142 (5th Cir. 1972) (en banc).

[16] Arvizu v. Waco I.S.D., 495 F.2d 499 (5th Cir. 1974).

[17] United States v. Texas Education Agency (Lubbock I.S.D.), 600 F.2d 518 (5th Cir. 1979).

[18] United States v. Midland I.S.D., 519 F.2d 60 (5th Cir. 1975)

this sorry record has twice concluded, in separate decisions, that the State of Texas has practiced intentional discrimination against Mexican American students on a statewide basis.[21]

Nor is the history of segregation of Mexican Americans into separate schools limited to the State of Texas. A federal court struck down intentional segregation of Mexican Americans in Orange County, California in 1946[22], and did likewise in Oxnard, California in 1974.[23] Federal courts found that Arizona school districts has intentionally segregated Mexican Americans in cases from Tolleson, Maricopa County[24] and Tucson.[25] And the same segregation has been found in Colorado's largest district in Denver.[26]

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[19] *Morales* v. *Shannon*, 516 F.2d 411 (5th Cir. 1975), *cert. denied* 423 U.S. 1034 (1976).

[20] *United States* v. *State of Texas (San Felipe del Rio Consolidated I.S.D.)*, 342 F. Supp. 24 (E.D. Tex. 1971).

[21] *United States* v. *State of Texas (Gregory Portland I.S.D.)*, ___ F. Supp. ___ (E.D. Tex. 1980); *United States* v. *State of Texas (Bilingual Education)*, 506 F. Supp. 405 (E.D. Tex. 1981).

[22] *Mendez* v. *Westminister School District*, 64 F. Supp. 544 (S.D. Cal. 1946), aff'd. 161 F.2d 774 (9th Cir. 1947).

[23] *Soria* v. *Oxnard School District*, 488 F. Supp. 579 (C.D. Cal. 1974), aff'd.   F.2d   (9th Cir. 1974).

[24] *Gonzalez* v. *Sheely*, 96 F. Supp. 1004 (D. Ariz. 1951).

[25] *Mendoza* v. *Tucson School District No. 1*.,   F. Supp. (D. Ariz. 1978), aff'd. 623 F.2d 1338 (9th Cir. 1980).

[26] *Keyes* v. *Denver School District No. 1*, 413 U.S. 189 (1973).

The eradication of discriminatory educational practices will not automatically produce well-educated, well-adjusted students. The impact of these practices continues today and has greatly affected Mexican Americans as they frequently do not have an equal chance to perform well on non-job-related written tests, may speak accented or limited English, and are denied opportunities on these bases.

This legacy of bigotry and discrimination is far from being overcome. To the contrary, recent data continues to reflect the relative deprivation of Mexican Americans in our society. The United States Bureau of the Census, for example, reports that as of March 1979 the overall unemployment rate for our nation was 6.1%; for Hispanics, it was 8.7%. For white youths, the unemployment rate was 12.5%; for Hispanic youths, it was 17.2%. In 1978, the median earnings figure for all non-Hispanic males was $12,300; for Hispanic males, it was $8,900. In that same year, the median earnings figure for all non-Hispanic females was $5,300; for Hispanic females, it was $4,700. Where Mexican Americans have penetrated the work force in significant numbers, they are concentrated in lower-echelon jobs. Sadly, even today, over 20% of all Mexican Americans continue to live below the poverty level.

We Hispanics have earned the right to affirmative action programs--unfortunately--by having proved in court that we are an oppressed minority group that has been subjected to pervasive discrimination and which therefore is entitled to equal protection under the law. We proved this first in 1954 in Hernandez v. Texas, where Supreme Court Justice Earl Warren held that, "Persons of Mexican descent constitute a separate class distinct from whites..." and we are, consequently, entitled to the aid of the courts in securing "equal treatment under the laws."[27] The gains of the last decade, although tangible, have not been sufficient to overcome the prejudice and discrimination which continue to permeate our society. We must come to understand that a decade of remedial efforts is simply not enough to compensate for generation after generation of bigotry and deprivation.

In light of this situation, it is clear that we must encourage and, indeed, in many instances require, the continued use of race and sex conscious measures to promote the integration of our society. If we are to solidify and build upon the progress of the last few years, we must guarantee that real equality must remain our goal. In particular, we must strengthen those elements of affirmative action which have been pivotal to its success and not move backward by diminishing the effectiveness of current affirmative action policies.

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[27] Hernandez v. Texas, supra at p. 479

V. LEGISLATIVE AND ADMINISTRATIVE PROPOSALS TO ALTER CURRENT AFFIRMATIVE ACTION POLICIES.

Several legislative and administrative proposals have emerged recently which severely threaten the future of affirmative action.

-- Senator Orrin Hatch's S.J. Res. 41, a Constitutional amendment barring the enactment or enforcement of any laws which make distinctions on account of race, color, or national origin and prohibiting the use of any numerical objectives which make such distinctions.

-- Congressman Robert Walker's H.R. 3466, amending the Civil Rights Act of 1964 to prohibit federal rules requiring employers to hire workers or schools to admit students on the basis of race, sex or national origin; and to bar the use of quotas, goals or timetables.

-- Congressman Paul McCloskey's proposal to revise the Executive Order governing the federal contract compliance program[28] so as to reduce drastically the effectiveness of the program by diminishing the reporting requirements for contractors, severely limiting the authority to impose sanctions, and stripping the Secretary of Labor's discretion to issue rules and regulations or to establish thresholds and reporting procedures.

-- The Department of Labor's proposed revisions of OFCCP regulations[29] which would, among other things, reduce the number of contractors affected by raising thresholds for basic coverage and for submission of affirmative action plans, redefine the concept of underutilization, eliminate pre-award reviews, and lower standards regarding sex discrimination.

These proposals are an outgrowth of the widespread misunderstanding of the concept of affirmative action. Generally, the thrust of these proposals is to eliminate or greatly minimize current affirmative action efforts in the public and private sectors.

I would like now to examine these proposals, focusing on the continuing need to utilize goals and timetables, statistical measures of compliance, and voluntary affirmative action programs.

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[28] Executive Order 11246 (1965). 30 Fed. Reg. 12319 (as amended)

[29] 41 C.F.R. Part 60.

A. Goals and Timetables.

Each legislative and administrative proposal cited above seeks to prohibit or limit the use of goals and timetables. We strongly support the continued use of numerical goals and timetables. Without such specific requirements, affirmative action efforts are a sham and useless for enforcement purposes. Affirmative action cannot rely on voluntarism only; there must be measurable standards to evaluate "good faith" efforts. Goals and timetables are the primary, and often the sole mechanism by which to ensure that employers and educational institutions are held accountable. Without them, the well-meaning will be left to flounder without any real measure of their progress toward integration while the more invidiously motivated will be allowed to evade their responsibilities by hiding behind such vague standards as "good faith" and "best efforts".

The Department of Labor has reviewed the status of minorities and women in the skilled trades and has found that unless specific affirmative action steps--including numerical measures of progress--are prescribed, employment opportunities in the trades will not extend to the minority and female work force. Specifically, the Department has stated,

> "[T]he Department of Labor's experience has shown that *the use of goals and timetables is the most effective means* for increasing the number of women and minorities in employment areas from which they have previously been excluded or have not been represented in proportion to their availability. Minority participation in apprenticeship and individual construction trades, for example, has *increased measurably as a result of* the minority outreach program and *the goals and timetables* requirement under 29 C.F.R. Part 30".

42 Federal Register 52442 (September 30, 1977) (emphasis added).

Abolishing goals and timetables as proposed by the legislative and administrative proposals would seriously undermine affirmative action efforts throughout the nation. Goals and timetables must be retained. In this regard, we should also understand that the differenc between "goals" and "quotas" is more than merely a semantic distinction. The numerical goals to which I refer are essentially targets for the selection of otherwise qualified minority and female candidates. They are not rigid formulae which require the selection of protected class group members without regard to merit.

Additionally, we stress that it is not unrealistic to expect that any given work force or student body contain a representative sample of minorities and women. To the contrary, we believe that in a society free of discrimination and composed of individuals "created equal" in innate abilities, such a result would follow as a matter of course. The Supreme Court has also adopted this common-sense view in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 1977 "absent discrimination, it is ordinarily expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired". 431 U.S. 324, 340 n. 20.

B. Effects Standard.

These proposals would also seek to alter the standard for a finding of discrimination by requiring the existence of an intent to discriminate on the basis of race, sex, or national origin. The "effects test" articulated by the United States Supreme Court in Griggs v. Duke

Power Co.[30], and related statistical measures of compliance with federal nondiscrimination provisions must remain the cornerstone of federal civil rights enforcement efforts. Discrimination in its most overt forms is becoming increasingly rare in our society. Rather, it now more commonly manifests itself in the form of elaborate selection criteria and procedures, or arbitrary qualification rules, which bear no real relationship to actual job performance. The end result, however, is unmistakably the same--minorities and women are denied available opportunities for jobs in which they could perform competently.

Given these realities it is therefore essential that the "effects" test, with its emphasis upon the relative statistical impact of particular practices on minorities and women, remain a vital part of our jurisprudence. To impose upon plaintiffs the burden of proving motive or intent in this era of sophisticated, covert discriminatory practices--and practices of facial neutrality but devastating racial impact--would tantamount to repeal of many federal nondiscrimination provisions.

We should not lose sight of the fact that the "effects" test considers more than merely the statistical impact of a given practice upon protected class groups. Even those practices which have an adverse impact upon minorities or women can be utilized where an employer can, in fact, demonstrate that the practices in question bear a relationship to the responsibilities of the particular position. As such, any retreat from statistical measures of compliance would not only hinder the elimination of discriminatory policies, it would generate no real benefits for employers and the business community.

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[30] 401 U.S. 424 (1971); "Effects test" is reiterated in subsequent Supreme Court opinions, e.g., Dothard v. Rawlinson, 422 U.S. 321 (1977); Int'l. Bhd. of Teamsters v. United States, supra.

On the contrary, it would encourage employers to return to simple but ineffectual measures of ability which fail to accomplish the goal of selecting the best qualified individual for the job:

C. Voluntary Affirmative Action.

Senator Hatch's proposed constitutional amendment and Congressman Walker's amendment of the Civil Rights Act of 1964 would make voluntary affirmative action efforts illegal by prohibiting consideration of race, sex or national origin. If affirmative action is to remain a viable mechanism, voluntary programs must be allowed to continue effectively--indeed, they should be encouraged. Voluntary programs can utilize the genius of the private sector and can reflect the diversity of our industry, people, and regions by tailoring programs to fit the specific needs of the situation. The Supreme Court gave great latitude to such programs in Weber. To limit affirmative action efforts to those instances where a court or an administrative tribunal has made a formal finding of discrimination--a limitation expressly rejected in the Weber decision--would only hinder its effectiveness. Essentially, such a restriction would only stifle the creativity of socially responsible employers and educational institutions while generating needless litigation and related legal proceedings.

D. OFCCP Regulations.

Congressman Paul McCloskey's proposal to revise Executive Order 11246 and the Department of Labor's (DOL) proposed revision of the regulations governing enforcement by the OFCCP of the Executive Order are particularly odious. These proposals signal an abrupt departure from our federal government's 40-year commitment to ensuring nondiscrimination by government contractors.[31]

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[31] President Roosevelt issued the first Executive Order barring discrimination by government contractors in 1941. Since that time, eight Presidents have supported the program and contributed to its development.

Discrimination in the workplace has not been eradicated. Federal contractors still hire and assign minority women and workers to race-and-sex-segregated, low-paid, unskilled positions, and still restrict promotion opportunities for minority and women workers, thereby confining them to the bottom of wage and promotion ladders. Despite this reality, DOL and Congressman McCloskey are proposing a reduced program, which relies largely on self-monitoring of contractors, which will not correct discrimination, and which will be viewed by contractors as a signal for backsliding.

We join with other civil rights, women's and labor groups in opposing these proposals to alter the Executive Order and the OFCCP. The following elements are crucial to an effective enforcement program:

-- retention of Executive Order 11246, as amended

-- retention of goals and timetables in affirmative action plans to measure compliance

-- no decreased coverage of contractors

-- continued authorization of debarment sanctions and back pay and other retrospective relief requirements

Current regulations require contractors to prepare and implement written affirmative action plans (AAP's) where they have 50 or more employees and a contract of $50,000 or more.[32] The Department is considering raising the levels to 100 employees and $1 million in contracts.[33] While estimates of the exact impact of this action have varied, we firmly oppose any reduction in the numbers of contractors subject to the AAP requirement. There is no justification for exempting upwards of 75% of federal contractors and subcontractors from the AAP requirement.

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[32] 41 C.F.R. §6-1.40.

[33] The Department's exact proposal has not yet been officially adopted.

The federal government must ensure that public funds not be used to subsidize employment discrimination.[34] DOL's proposed action is in response to employer/contractors' active lobbying and fails to address the continued need of minority and female employees for protection against discrimination.

The Department's consideration of a proposal to rescind the requirement of backpay and other retroactive relief is shocking. Victims of unlawful discrimination should be compensated. Backpay relief is an essential part of an effective federal contract compliance program. Contractors' incentive to not discriminate will be minimal if the backpay relief is eliminated.[35]

There are numerous other proposed provisions which would alter the current federal contract compliance program. We stand ready to oppose any dilution of the existing Executive Order and join other national groups in this effort.

Conclusion

I am deeply troubled by the proposed policies and regulatory changes relating to affirmative action and equal employment opportunity enforcement. We believe there is a continued need for aggressive affirmative action efforts to ensure that minorities and women are accorded equal treatment in our society. The problems which affirmative action was intended to remedy--prejudice and discrimination--are still very much with us, and so long as they remain, we see no reason to abandon what has, in effect, become the one workable mechanism in achieving their elimination. We would not argue that affirmative action is a simple solution or, indeed, that it is a perfect one. Undoubtedly, it has resulted in instances in which employers and educational institutions have had to contend with unrealistic, bureaucratic demands. These isolated instances, however, should not lead us to lose sight of the fundamental soundness of affirmative action.

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[34] Castillo v. Usery, 14 FEP Cases 1240, 1250 (N.D. Cal. 1976).

[35] Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) supported this view stating "if employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a back pay award that provides the spur or catalyst which causes employers and unions to self examine and to self evaluate their employment practices ..."

Affirmative action is necessary if we are truly to fulfill the American ideals of equal opportunity and full democracy. The best way to end the need to consider race, national origin or sex in the parcelling out of opportunities and the best way to end inequality is to give all people the opportunities they need and have been denied too long. Affirmative action is the only device we have to accomplish that. For the sake of *all* Americans--it must not be abandoned.

STATEMENT OF VILMA S. MARTINEZ, PRESIDENT AND GENERAL COUNSEL, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

Ms. MARTINEZ. For the past several years much of our work has been concentrated in the areas of employment, education, immigration, and voting rights. Given the nature of our work, we are keenly aware of the significance of the issues before this subcommittee today and appreciate your invitation to testify at these hearings.

As the economy worsens and Americans fear more for their own economic survival, all sorts of epithets are aimed at programs providing access to minorities. Legislative, regulatory, and constitutional proposals opposing affirmative action have emerged to threaten the future access of minorities and women to our institutions which even today, 17 years after the Civil Rights Act of 1964 was enacted, remain the bastion of white America.

Affirmative action remains an essential tool in the national efforts to provide true equal employment and educational opportunity for members of groups to whom it has been denied in the past. We oppose any weakening of our national commitment to equal opportunities for minorities and women.

Specifically, we oppose the current proposals to amend or alter Executive Order 11246, amend the Civil Rights Act of 1964, and amend the Constitution to prohibit affirmative action. These proposals threaten to undermine the modest gains made by minorities and women in recent years and are a smokescreen covering what are essentially efforts to return to old racist modes of behavior.

Affirmative action quite clearly is a matter which affects the lives of virtually every American, yet despite this pervasive impact it is misunderstood. Affirmative action implicitly or explicitly uses race, sex, and national origin as criteria in decisionmaking. It is not a system of inflexible quotas or other mechanical formulae designed to give preference to other minority or female candidates regardless of qualifications.

I am convinced that without the affirmative action requirement contained in Federal laws, the participation of minorities and women would be but a fraction of their current numbers in our society. The legality of race- and sex-conscious remedies which have led to the integration of minorities and women into our institutions can no longer be questioned.

The U.S. Supreme Court has consistently held that the consideration of race or ethnicity as one of the many factors in the selection process is permissible. Nonetheless affirmative action continues to be the subject of considerable controversy. Its detractors allege that it is inconsistent with the fundamental principles of American society, that its implementation is too costly, that it only results in reverse racism. But none of these arguments can withstand close intellectual scrutiny.

Let me at least address two of these: the preferential treatment and the reverse racism. Preferential treatment implies an unfairness in the selection process and fails to address the fact that affirmative action is needed to revise the process that allocates opportunities discriminatorily. Affirmative action measures actually try to change the status quo that systematically disfavors minorities and women to an open system that provides them with an equal opportunity. The elimination of affirmative action would return us not to a mythical world where all are judged equally but rather to the actual American past in which minorities and women were always under a severe disadvantage in obtaining positions in employment and education.

Affirmative action has also been attacked by its opponents as being reverse discrimination. This fails to take into consideration that affirmative measures are only appropriate where there is a clear underrepresentation of minorities or women. This country has indeed experienced a long period when invidious racial-, ethnic-, and sex-based quotas overrode individual qualification.

Affirmative action seeks to reverse the damage done to our society by quotas of the past, not by imposing like restrictions on white males' opportunities but by lifting arbitrary barriers to utilization of talents that have not merely been overlooked but systematically suppressed.

The most significant shortcoming however of the critics of affirmative action lies not in the illogical substance of their arguments but in their apparent inability to see the long-range societal benefits of race- and sex-conscious remedies. Although in some cases imperfect, these programs have become a valuable tool in our efforts to build a fully integrated society.

Although these gains are modest, their value should not be underestimated. It is through mechanisms such as affirmative action that Hispanics and other minority group members have been given a stake in this Nation's societal institutions. One need only recall that violence and turmoil which rocked the inner cities of this Nation during the late 1960's to comprehend that such a stake is vital not only to the well-being of our minority communities but to the welfare of our Nation as a whole.

Even if one chooses, however, to ignore these long-range benefits, it is clear that affirmative action must remain a viable concept so long as racism and discrimination continue to plague our society. Clearly, for this Nation's Mexican American people the tradition of prejudice and discrimination is deeply rooted throughout the Southwest and indeed throughout the country.

As the Supreme Court's decisions make abundantly clear, systemic discrimination against Mexican Americans in selection of jurors and all aspects of the administration of justice has long been the rule. Similarly, segregation in public accommodations and facilities has also been commonplace.

In employment, discrimination has been pervasive. Educational discrimination has also been an accepted fact of life. Federal courts have found such segretation in dozens of localities throughout the State of Texas including Austin, El Paso, Corpus Christi, Waco, Lubbock, Midland, Uvalde, and Del Rio.

But the history of segregation of Mexican Americans into separate schools is not limited to Texas. A Federal court struck down intentional segregation of Mexican Americans in Orange County, Calif., in 1946 and likewise in Oxnard, Calif., in 1974. Federal courts have found that Arizona and Colorado school districts have also intentionally segregated Mexican Americans.

This legacy of bigotry and discrimination is far from being overcome. To the contrary, recent data cited in my testimony continue to reflect the relative depravation of Mexican Americans in our society.

Mr. HAWKINS. Ms. Martinez, may I interrupt?

Ms. MARTINEZ. Yes, sir.

Mr. HAWKINS. We do have a series of bells that are beginning to ring again. There is a vote pending in the House. This time let me try to confine the recess to 5 minutes. We will return just as quickly as possible.

I hate to rush over your testimony because I think it is well prepared and well stated. With your indulgence, at this time, the subcommittee will stand in recess for 5 minutes. We will return just as quickly as possible.

Thank you.

[Recess was taken.]

Mr. HAWKINS. Ms. Martinez, you may proceed.

Ms. MARTINEZ. Thank you, Mr. Chairman.

Let me now turn my attention to several legislative and administrative proposals which have emerged recently and which severely threaten the future of affirmative action. I am talking about Senator Hatch's constititional amendment, Congressman Walker's amendment to the Civil Rights Act of 1964, Congressman McCloskey's proposal to revise the Executive order governing the Federal contract compliance program, and the Department of Labor's proposed revisions of OFCCP regulations.

Generally the thrust of these proposals is to eliminate or greatly minimize current affirmative action efforts in the public and private sectors. I would like to examine these proposals.

Each legislative and administrative proposal cited seeks to prohibit or limit the use of goals and timetables. We strongly support the continued use of numerical goals and timetables. Without them the well-meaning will be left to flounder without any real measure of their progress toward integration while the more invidiously motivated will be allowed to evade their responsibilities by hiding behind such vague standards as good faith and best efforts.

These proposals would also seek to alter the standard for a finding of discrimination by requiring the existence of an intent to discriminate on the basis of race, sex, or national origin. The effects test articulated by the U.S. Supreme Court in *Griggs* v. *Duke Power Co.* and related statistical measures of compliance with Federal nondiscrimination provisions must remain the cornerstone of Federal civil rights enforcement efforts.

Discrimination in its most overt forms is becoming increasingly rare in our society. Rather, it is now more commonly manifested in the form of elaborate selection criteria and procedures or arbitrary qualification rules which bear no real relation to actual job performance. The end result, however, is unmistakably the same.

Minorities and women are denied available opportunities for jobs in which they could perform competently. Senator Hatch's amendment and Congressman Walker's amendment would make voluntary affirmative action efforts illegal. Volunteer programs must be allowed to continue. Indeed they should be encouraged. Voluntary programs can utilize the genius of the private sector and can reflect the diversity of our industry, people and regions by tailoring programs to fit the specific needs of the situation.

The Department of Labor and Congressman McCloskey are proposing a reduced program which relies largely on self-monitoring of contractors which will not correct discrimination and which will be viewed by contractors as a signal for backsliding. We oppose this because Federal contractors still hire and assign minority women and workers to race- and sex-segregated low-paid unskilled positions and still restrict promotion opportunities for these workers.

In closing, I am deeply troubled by the proposed policies and regulatory changes relating to affirmative action and equal employment enforcement. We believe there is a continued need for aggressive affirmative action efforts to ensure that minorities and women are accorded equal treatment in our society.

The problems which affirmative action was intended to remedy, prejudice and discrimination, are still very much with us and so long as they remain, we see no reason to abandon what has in effect become the one workable mechanism in achieving their elimination.

We do not argue that affirmative action is a simple solution nor indeed that it is a perfect one. Undoubtedly it has resulted in instances in which employers and educational institutions have had to contend with unrealistic bureaucratic demands. These isolated instances, however, should not lead us to lose sight of the fundamental soundness of affirmative action. For the sake of all Americans, it must not be abandoned.

Thank you.

Mr. **Hawkins**. Thank you, Ms. Martinez.

In your prepared statement you discuss the validity of goals and timetables. Do you consider that there are any realistic or effective alternatives to such goals and timetables? In other words do you see any means of eliminating them or providing any alternative that would be as effective?

Ms. MARTINEZ. That is the question of course. I do not see any that would be as effective and as fair. There are alternatives. One can abandon them in favor of, as I have said, good faith efforts but then one is left with the question of what is good faith instead of something that is measurable.

Mr. HAWKINS. How would you determine what is good faith, by what process if you relied on it?

Ms. MARTINEZ. I am suggesting that I would not know how to determine good faith and that quite candidly we should look at results. This is precisely what the numerical goals and timetables permit us to do and permit an employer to do.

I think it is mutually beneficial both for the group needing the protection and the employer seeking to provide that protection to have a clearly articulated standard by which to measure success. Good faith does not provide such a standard. Numerical goals and timetables do. For that reason we would continue to believe and argue in the validity of numerical goals and timetables.

I hasten to add, Mr. Chairman, that we really are not talking about quotas. We are talking about goals and timetables, measures.

Mr. HAWKINS. Then you make a sharp distinction between quotas, on the one hand, and goals and timetables on the other, in terms that one sets targets and the other is not tied down to any specific standard.

Ms. MARTINEZ. Exactly.

Mr. HAWKINS. Among the various legislative proposals that you have analyzed and specifically among the administration's proposals to make changes in regulations or to propose revisions, have you found any change that helped those who claim discrimination as opposed to such changes that help those who are accused of discrimination? In other words, have you seen anything positive in any of the proposals that would in any way reinforce the case of those who claim discrimination?

Ms. MARTINEZ. I have to admit that I am afraid that I do not. I think it would muddle the waters. I think it would diminish rights. When you are looking at Senator Hatch's proposals for example, we could not have voluntary efforts of the sort that Representative Fenwick was talking about with the prior witness. They would be illegal if Senator Hatch's amendment become law.

When I look at the changing of the standard for measuring discrimination to use an intent standard, again clearly that is not going to help victims of discrimination when increasingly this society has become more subtle in the way it discriminates against people. When you look at some of the proposals being talked about in deciding what contractors will be reached by OFCCP, you are looking at I think doing away with coverage of about 75 percent.

So again I do not see how that benefits not only the victims of discrimination but the society as a whole. To me it constitutes a very clear retrenchment, a very clear message to the populace that we may now return to old racist modes of behavior, because I do not believe we have had this mythical world, as I have called it, of equality of treatment under our laws.

Mr. HAWKINS. Many have stated that other immigrant groups have made it without affirmative action, and therefore ask why Mexican Americans or those of Mexican ancestry cannot also make it without assistance. What answer do you give to such an argument as that?

Ms. MARTINEZ. The answer that I give is that our law provides us with the opportunity to go into court and prove that we are an oppressed, discriminated-against minority group entitled to the protections of the 14th amendment and therefore to help through affirmative action.

I am unhappy to report to you that Mexican Americans have more than met that burden on many occasions. In a case called *Hernandez* v. *Texas* in 1954 the U.S. Supreme Court held, and I quote: "Persons of Mexican descent constitute a separate class distinct from whites and are consequently entitled to the aid of the courts in securing equal treatment under the laws."

The Court also noted that, and I quote again: "For many years children of Mexican descent were required to attend a segregated school for the first four grades and at least one local restaurant prominently displayed a sign announcing 'No Mexicans Served' and on the courthouse grounds there were two men's toilets, one unmarked, the other marked Colored Men and Hombres Aqui." That means "men here."

It is this type of discrimination that we are talking about. We are not talking about a melting pot and whether or not you can find a job. The Mexican-American community has proven in court time and time again, whether in *Hernandez* v. *Texas,* in subsequent cases such as *White* v. *Registrar* challenging the at-large method of electing State legislators in Texas, or most recently this year in *United States* v. *Texas* challenging the denial of educational opportunity on an equal basis to Mexican-American children throughout the entire State of Texas.

Time and time again we have proven that we are an oppressed, discriminated-against minority group entitled to these protections. That is what the law permits. That is what the law requires. I am sorry to have to report that to you.

Mr. HAWKINS. The statement is made, and I think it has been alleged even today, that these laws, moreover these programs, have not worked. Please consider the fact that the gap in employment has not been closing, and the fact that discrimination is still quite pervasive. What argument would you offer for the defense of these laws and programs to those who say that since the laws have not worked, as exemplified by the fact that minorities and women are still being discriminated against, why not have a change?

Ms. MARTINEZ. I would argue that I believe they have worked. If you look at some of the studies that I cite in my testimony, Professor Leon's study of admissions at the University of California in terms of minorities' access as a consequence of affirmative action, when you look at the work force of the State of California and analyze it after extensive affirmative action efforts are made and you see the very real differences, they are modest but they are differences.

They prove to me that the laws are working and that they do provide a hope for the future. I, of course, have to be realistic and say that the gains truly are modest because in part we are in the middle of an economic recession. Of course that is true, and we are not going to see the rapid happy gains that we might see if we were in a period of enormous industrial and economic growth. We cannot expect to see that kind of result but we do see these programs as working.

The other argument that I would make is the argument I have made already in terms of giving people a stake in the community. People must feel that they truly belong to the community, that there are ways that the courts and the Nation and the political leaders will permit the formation of the community of interests. Affirmative action programs attempt to do that to groups which have traditionally been excluded from the community.

I think it is very important to give people that stake, to give people that access. I would think that even though they might not be as effective as we would like them to be, we need to have something. And until somebody comes in with a proposal that looks like it has tremendous potential for success, then I say I will at last keep what I have that is working.

Mr. **Hawkins**. Would you agree then with the statement that full employment and equal employment go hand in hand? We must have both?

Ms. **Martinez**. Of course, yes.

Mr. **Hawkins**. Thank you.

Mr. Washington?

Mr. **Washington**. Thank you, Mr. Chairman.

I want to commend you for your statement, Ms. Martinez, which was marvelous but also to commend you for the excellent work you have done in fighting for the extention of the Voting Rights Act. It once again illustrates the community of interest between blacks and browns in this country. I think that community of interest should be made clear so that no one gets confused by where we stand.

Clearly as I see it, there is growing in this country an attempt to divide the two groups from their common goal and to attack each individually. How successful it will be will depend upon the leadership and the perspicacity of the two groups. I think we have both, and I want to commend you for that.

But at any rate I strongly believe in affirmative action, period. But some are saying that perhaps affirmative action tools which are designed to escalate one up the economic ladder should not be applied as rigorously for Latin peoples as they are for blacks. I can anticipate your comment but I would like to hear it.

Ms. **Martinez**. Yes. I would like to respond to that by sharing with you our history, our experience in Texas. In the late 1960's, early 1970's when MALDEF was born we went into court in Texas. Texas, as you know, is a part of the Deep South and had mandated the segregation of the children of the white and the colored races.

We argued that Mexican American children were now entitled to a desegregated education under *Brown* v. *Board of Education.* The school board lawyers looked at us and said to the judge: Your Honor, we have always considered them white.

We proved that they might have considered us white but that they had treated us as colored. We sustained that burden which, as you know, is the burden that blacks have in Northern settings when they tried to prove de jure school segregation. We sustained that burden in every instance.

So it is certainly crystal clear to me that we are very much in the same category. Of course, there are differences. There are historical differences. There are important differences. And nobody needs to minimize them. Blacks were subjected to slavery. We were not. We were subjected to peonage. We were subjected to discrimination in a systemic way. And now we must correct both.

I would like to address if I may the political leadership. I remember when I was the new general counsel of MALDEF in 1974. I was called by a reporter who said Ms. Martinez, we understand that your group wants bilingual education and of course that is going to destroy desegregation here in the San Francisco school district; what do you have to say about that?

I said, I have to say that Supreme Court decisions require that all of our children receive a desegregated education and that some of our children who are limited English-speaking deserve and require bilingual education and that this means some bureaucrat is going to have to sit behind some desk longer than he or she wants to and accommodate these very real interests and concerns of all of the children of San Francisco.

When I went to testify before Senator Hatch on affirmative action, one of his questions to me was Ms. Martinez, I have been receiving a lot of complaints from Hispanics that the EEOC, the Department of Justice and OFCCP are not responding to their valid complaints because they are too busy responding to the complaints of blacks; what do you have to say about that.

I said well, Mr. Senator, I would have to say that the EEOC, the OFCCP and the Department of Justice are not perfect institutions but they are all we have to redress some very real discrimination against blacks, Hispanics, women and other protected groups.

Mr. WASHINGTON. I think your response was excellent. I think all three groups should be very aware of the tactics of the Hatchs of the world and do something to dispel them, because unless we go up together, we are going to go down separately. [Laughter.]

I was interested in your statement about the use of goals and timetables. There seems to be a hostility to the use of numerical measurements in the civil rights law in that field. That does not exist in other areas. I often listen to critics of the use of numerical goals and ask myself how the Government is expected to measure anything unless it resorts to statistics.

My question is this. Do you think it would be more reasonable for the Government to simply say that a company, because of its equal employment opportunity policies, is simply barred from a contract? Or should they be put on notice for some grace period to redeem themselves? How rigid should the Government be? Or should it use both approaches? In other words the effect, the approach, how should we go about this business?

I am assuming the whole business will be intact once Mr. Reagan gets through with his hatchet.

Ms. MARTINEZ. I think that numbers are needed in analysis, in thoughtful, careful, caring analysis. We need numbers to find out if there is discrimination. We need numbers to recommend, once we find discrimination, what realistically can be accomplished. We need them further to measure what has been accomplished from year to year and from contract to contract.

I think that the way we operate now with the OFCCP regulations in terms of contracting procedures, given the great body of due process law, it is clear to me that there is a lot of due process protection for the contractor. And the contractor cannot have his contract terminated or funds cut off without a hearing to show what has been accomplished. These numbers play an important part in that process.

That is why I continue to believe that if you are serious about accomplishing something, if you are serious about being fair to everybody involved in accomplishing something, you must have a numerical standard, a numerical measure.

Mr. WASHINGTON. How rigid should the sanctions be?

Ms. MARTINEZ. They should be as rigid as they are today. The employer has to show what he has done. If it is clear that he has not done anything, has not even tried, then there ought to be a finding that this employer is barred from future contracts. Candidly, we have not used that very much. We have not used it, rarely have.

Mr. WASHINGTON. That is the whole point. In other words in order to redeem some people you have to, as Lincoln Stephan said, take away the apple entirely and not dangle it.

Ms. MARTINEZ. Exactly, and as I say, that is built in now but has rarely been invoked.

Mr. HAWKINS. Will the gentleman yield?

Mr. WASHINGTON. Yes.

Mr. HAWKINS. May I ask this question? Do you believe that a contractor bidding for a Government contract should be required to show before the contract is awarded that that contractor intends to comply with the law and has an affirmative action plan somehow in view?

Ms. MARTINEZ. Absolutely, Congressman Hawkins. I think the contractor who wants public moneys should show intent, which is what we are talking about. We are talking about the money of the public because that is what the Government is: the public.

Mr. HAWKINS. In other words do you agree that there should be a clearance before the awarding of a contract just as one would award a contract to a contractor bidding on a project on the basis of what materials are going to be used, whether labor and safety standards are going to be complied with and in the case of Defense what certain types of materials protections will be built into the contract?

Do you believe that in the same way the contractor bidding for a contract, I should say dipping his hands in the public treasury, should not be required to show a little democracy?

Ms. MARTINEZ. Exactly, and to put it in legal terminology, there is no right to a public contract. It is a privilege. And if you wish to avail yourself of that privilege, then I think you ought to share the burdens of public life. One of those burdens is correcting very real present consequences of past discrimination against certain groups.

Mr. **Washington**. One of the responses of the contracting element that we are talking about is that these preclearance provisions, these statistical mandates create an undue burden on the contractors.

Ms. **Martinez**. Then they do not have to apply for public contracts. It is simple.

Mr. **Washington**. I will yield with that.

Thank you, Mr. Chairman.

Mr. **Hawkins**. I think, Ms. Martinez, you have been very helpful. We have no further questions that I know of.

As we have issued the invitation to the other witness, we will invite a continuing dialog with you which will be helpful as the committee proceeds, particularly in its field hearings throughout the Southwest. After we leave the city of Chicago we will be on the west coast and we will be in the Deep South or at least in Texas. I do not know whether you call that the Deep South or not.

Ms. **Martinez**. I always call Texas our Mississippi, Congressman. [Laughter.]

Mr. **Hawkins**. Having a few friends in Texas, I am not going to comment on that.

Ms. **Martinez**. Having been born there, I can.

Mr. **Hawkins**. Thank you, and thanks again for your testimony.

Ms. **Martinez**. Thank you, and we look forward to working with you in all of the jurisdictions.

Mr. **Hawkins**. Thank you.

The next scheduled witness is Ms. Eleanor Smeal, president of the National Organization for Women.

Ms. Smeal, we congratulate the work of the National Organization for Women. We also anticipate your participation in our field hearings at certain points. We want to commend you for the progress that you have made in the direction of putting women really at the top of the agenda. Sometimes I think we should have a National Organization for Men too that is doing equally as good a job as you are doing. You do have men in your organization, do you not?

Ms. **Smeal**. Yes, we do. We have male members.

Thank you, Mr. Chairman.

[The prepared statement of Eleanor Smeal follows:]

PREPARED STATEMENT OF ELEANOR CUTRI SMEAL, PRESIDENT, NATIONAL ORGANIZATION FOR WOMEN

My name is Eleanor Smeal and I am President of the National Organization for Women, the largest membership organization in the United States dedicated to the achievement of equal political, legal, social and economic rights for women. On behalf of NOW's 140,000 membership, I want to express our appreciation to the members of this Committee for this opportunity to express our growing concern with the economic plight of women in today's society and the seemingly uncaring attitude toward that plight by the Reagan Administration.

Eighteen years after the enactment of Title VII, sex discrimination remains a pervasive force in the workplace. Hiring, wages, promotions, work conditions, benefits, tenure, and treatment are all affected. Documented studies, statistics, court cases, and testimonies abound which analyze and describe the nature of sex discrimination on the job. Across the board -- by age, race, and occupation -- women on the average are still paid substantially less than men, have less status, smaller and fewer benefits, and suffer more unemployment. Sex discrimination is so rampant and severe in the workplace that the concept of sex segregation rather than sex discrimination more adequately describes the lot of ordinary women in the marketplace or industry.

The sex discrimination can be most graphically demonstrated by charts which describe the wage gap -- the amount on the average that women are paid for every dollar men are paid. To illustrate this situation, we present six charts:

Chart 1. Over the Past 25 Years, the Wage Gap on Annual Earnings has Widened

Chart 2. An Analysis of Wage Gap by Race

Chart 3. 7 out of 10 Full-Time Workers Paid Less Than $100 a Week were Women

Chart 4. Men Paid More than Women at Every Age Level

Chart 5. An Analysis of the Wage Gap by Full-Time Occupations

Chart 6. An Analysis of Income by Sex and Education Level

Despite continued discrimination, women's participation in the labor force has increased dramatically. Today, 51% of all women in the United States are in the paid labor force either employed or actively job hunting. The dramatic increase in paid women workers is unaffected by marital status; today over one-half of married women are also in the labor force.

These statistics for all women in the labor force are somewhat deceptive. A far higher percentage of women in the work force will be evidenced as the current work force ages. Approximately 64% of all women age 25-34 were in the labor force by 1979, as compared to 39% of the same age group in 1965. These women include 54% of the mothers in this age group who maintained dual responsibilities for home and child care with those of a job. Today, and increasingly in the future, the prevailing work pattern of both males and females will be full-time workers in the paid labor force.

It is clear to us that a particularly significant factor in the increasing participation of women in the American workforce and the achievement of such equal employment opportunity as women currently possess is the enforcement (both public and private) of federal anti-discrimination laws and Executive Orders. But, it is important to be aware of the fact that progress has not been achieved by virture of resolution of individual complaints of discrimination. Rather, it has been the use of class actions and the obtaining of affirmative class relief, as well as affirmative policies required of government contractors, that have brought us to this point. The Reagan Administration appears to understand this. Almost since it took office, it has expressed its desire to curtail this most successful vehicle for achieving equality of opportunity. Now, the Administration is beginning to implement that policy.

Enforcement of equal employment opportunity by the EEOC, the agency which Congress especially entrusted with this task, has been substantially undermined by the Administration's twin policies of neglect and cutbacks. It is nothing short of scandalous that two seats on the commission have been allowed to remain vacant for all these months and that a new chairman has yet to be confirmed ~~appointed~~. Without strong leadership, the Commission can never fulfill its trust. Indeed, the type of broad industry-wide investigations of institutionalized discrimination among the larger employers, which members of the Commission have instituted in the past, can hardly be expected in the present leadership vacuum. Yet, only these sorts of activities will have meaningful results for significant number of persons. Only these will act as meaningful deterrents to unlawful practices of other employers. As if these Commission vacancies were not sufficiently crippling, the Administration has administered a coupe de grace to the agency's effectiveness by directing a 10% across-the-board staff reduction.

The Administration's disquieting attitude toward equal opportunity can also be observed in the proposed changes to the regulations issued by the Office of Federal Contract Compliance Progress (OFCCP) pursuant to Executive Order 11246. Under the smokescreen of such buzzwords as "over-regulation" and "paperwork burdens," the Administration is substantially withdrawing the federal government from its longstanding commitment to equal opportunity for women and minorities. The Administration is doing this by, among other things: (a) eliminating for approximately 75% of all federal contractors the requirement that they prepare written affirmative action plans; (b) by eliminating the requirement that contractors report annually on their progress in meeting their affirmative action obligations; (c) creating loopholes by which corporations can avoid the preparation of affirmative action plans by the use of numerous small contracts (none of which exceeds the new threshhold) in lieu of a single larger one; (3) providing blanket exemptions from future compliance reviews for certain employers who are currently in compliance; and (e) eliminating preaward reviews of a contractor's EEO record. What the Administration will consider next, we shudder to think.

Critics of affirmative action have suggested to the Administration that it would be desirable to reexamine programs of affirmative action generally and to construct a system which will place an even greater burden on those initiating legal suits by requiring them to prove intent to discriminate as well as the actuality of discrimination and at the same time to eliminate numerical data as evidence of such discrimination or a pattern of discrimination.

The institution of an intent requirement would fly in the face of recent Supreme Court rulings interpreting the scope of Title VII. The Supreme Court ruled in Griggs v. Duke Power Company (1971) that under Title VII, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices..." Griggs further states that the burden of proof falls upon the employer to prove that any job selection criteria that in effect exclude women or minorities from a particular workplace, are both job related and justified by an overriding business necessity. In Griggs, the Court recognized that discrimination occurs when a practice negatively affects members of a particular race, sex or ethnic group regardless of intent.

The elimination of the use of numerical data as proof of discriminatory employment patterns or practices would make anti-discrimination regulations virtually impossible to enforce. The allegation that affirmative action programs are forms of reverse discrimination since they take into account race and sex and employ numerical indices to measure women's and minority representation negates enforcement mechanism. Commitment to "equality of opportunity" must be measured by "equality of result." If the intent of legislation is not to produce results, what is it? It is clear from the 1964 legislative history that members of Congress were expressly concerned with blatant underrepresentation (in numbers) of minorities and women in particular job fields. The Supreme Court examined and affirmed this aspect of Title VII legislative history in U.S. Steelworkers of America v. Weber in 1979, and also upheld the practice of affirmative action programs. The Court held that Title VII did not prohibit race-conscious affirmative action programs and stated "...an interpretation of the sections /of Title VII/ that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute' and must be rejected."

With inflation biting harder into women's smaller wages, this is not the time to retreat from affirmative action efforts. Rather we urge this Committee to give the Equal Employment Opportunity Commission and Office of Federal Contract Compliance Programs the necessary support for vigorous enforcement. This is not the time to back off initiating litigation or class action suits. Just as piecemeal legislation is not the answer, neither is piecemeal litigation. Now more than ever, American families and women are dependent on females' salaries, and only systematic efforts to eliminate massive sex discrimination can be effective for the many who suffer because of sex discrimination in the workplace. Moreover, because of sex segregation in the workplace, the EEOC's previous "comparable worth" efforts to eliminate sex discrimination must be vigorously encouraged and increased -- not reduced.

It has taken us a long time to get where we are and that is not very far. The women of the nation will not tolerate any reversal or impediment to their obtaining full equal economic opportunity.

President Reagan promised during his election campaign to help eliminate sex discrimination by a statute by statute, case by case approach. The women's movement always knew that the "E.R." and not the "A." approach was blatant opposition to women's progress. There can be no women's equality without the Equal Rights Amendment. Interestingly enough, the Louis Harris poll of June 1981 revealed that if the 1982 elections were held today, men would vote Republican by a close 49% to 45% margin, while women would vote Democratic by a decisive 52% to 41% margin. The backlash to the Reagan Administration, we believe, is based largely upon the female perception that Republicans are standing in the doorway blocking access to equal opportunity, equal pay, and equal rights for women.

Chart 1

Over the Past 25 Years, the Wage Gap of Annual Earnings has Widened

The annual earnings of full-time workers in 1955 was $2,719 for women and $4,252 for men, roughly 64¢ to the dollar. In 1979. full-time median annual earnings were $10,168 for women and $17,062 for men. Thus, women were paid 59¢ for every dollar paid men. Women work 9 days to gross what men do in 5.

Since 1955, the annual earnings of women have been between 64% and 56% of men's earnings. For every dollar paid men, women were paid the following:

1955	63.9¢
1959	61.3¢
1960	60.8¢
1962	59.5¢
1965	60.0¢
1967	57.8¢
1970	59.4¢
1972	57.9¢
1973	56.6¢
1975	58.8¢
1977	58.9¢
1978	59.4¢
1979	59.5¢

SOURCE: U.S. Department of Labor

Chart 2

An Analysis of Wage Gap by Race

		Earnings as % of white males
White Males	$279	100%
Black Males	$213	76%
Hispanic Males	$201	72%
White Females	$167	60%
Black Females	$156	56%
Hispanic Females	$141	50%

The above data reflect median weekly earnings for full-time workers, 1978.

SOURCE: U.S. Department of Labor

Chart 3

7 Out of 10 Full-Time Workers Paid Less Than $100 a Week Were Women

Of all full-time workers paid under $100 per week, 71% were women in 1978, and of those paid $100 - $124, 66% were women. On the other end of the pay scale, of the workers paid $500 or more a week, only 6% were women and 94% were men -- nearly all of whom were white.

The percent distribution in 1978 for high and low pay was as follows:[1]

	Under $100	$100 - $124	$400 - $499	Over $500
Men	28%	34%	91%	94%
White	22%	27%	86%	90%
Black	6%	6%	3%	2%
Hispanic	3%	4%	2%	1%
Women	71%	66%	9%	6%
White	60%	55%	8%	5%
Black	11%	10%	1%	.8%
Hispanic	5%	5%	.1%	.1%
$ Distribution	100%	100%	100%	100%

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[1] Because of rounding and special Hispanic counts by the Bureau of Labor Statistics, the sums of individual groups may not equal totals

Chart 4

Men Paid More Than Women At Every Age Level

Men are paid more than women at every age level, but in 1978, there were differences based on age:

Age Group:	Women	Men	Women Earnings as % of Men's
16 to 24	$142	$185	77%
25 to 34	$182	$275	66%
35 to 44	$172	$326	53%
45 to 54	$173	$316	55%
55 to 64	$168	$279	60%
65 and over	$125	$201	62%

The above data reflect median weekly earnings for full-time workers, 1978.

SOURCE: U.S. Department of Labor

Chart 5

Wage Gap By Full-Time Occupations

	median pay		female ¢ for e $ paid to men
	male	female	
ALL FULL TIME WORKERS (34% female)	$15,730	$ 9,350	59¢
CLERICAL WORKERS (76% female)	15,289	9,158	60¢
Secretaries & Stenos (99%)	9,820	9,400	96¢
Typists (96%)	12,167	8,706	71¢
Bookkeepers (90%)	13,646	8,925	65¢
Cashiers & Counter Clerks (81%)	10,643	7,528	71¢
Office Machine Operators (75%)	15,194	9,276	61¢
Other Clerical (60%)	15,496	9,357	60
SERVICE WORKERS (49% female)	$11,057	$ 6,832	62¢
Private Households (95%)	5,461	2,830	52¢
Health Services (88%)	10,515	7,926	75¢
Personal Services (64%)	9,042	7,104	79¢
Food Services (63%)	8,543	5,941	69¢
Other than Private Household (47%)	11,076	7,010	63¢
Cleaning Services (27%)	9,807	7,000	71¢
Protective Services (5%)	15,184	10,822	71¢
PROFESSIONAL AND TECHNICAL WORKERS (37% female)	$19,289	$12,633	65¢
salaried unless otherwise noted			
Health Workers (83%)	14,709	12,497	85¢
Teachers (59%)	16,468	12,529	76¢
Elementary & Secondary (66%)	15,274	12,400	81¢
College & University (24%)	21,139	15,116	71¢
Accountants (30%)	18,968	12,598	66¢
Computer Specialists (20%)	20,156	14,490	72¢
MD's & Dentists (12%)	29,839	26,373	88¢
Engineering & Science Tech. (14%)	23,721	20,306	86¢
Engineers (2%)			
OPERATIVES (27% female)	$13,660	$ 8,005	59¢
Manufacturing (35%)	13,839	8,138	59¢
Operatives, ex. transport (36%)	13,470	7,995	59¢
Non-manufacturing (11%)	13,337	7,152	54¢
Transport, Equip. Operatives (2%)	14,071	8,364	59¢

Chart 5

(page 2)

	median pay male	 female	female ¢ for e $ paid to men
SALES WORKERS (26% female)	$16,839	$ 7,644	45¢
Sales Clerks (53%)	10,264	6,539	64¢
Retail Trade (42%)	11,615	6,582	57¢
Insurance, Real Estate, Stock Agents & Brokers (26%)	20,943	10,254	49¢
Other Sales (12%)	17,949	11,783	66¢
Manufacturing & Wholesale (13%)	20,007	12,328	62¢
MANAGERS AND ADMINISTRATORS (27% female) salaried unless otherwise noted	$20,479	$11,120	54¢
Finance, Insurance & Real Estate (32%)	21,885	11,187	51¢
Retail Trade (26%)	15,996	8,626	54¢
Retail Trade, self-employed (22%)	10,727	5,401	50¢
Public Administration (22%)	19,480	14,273	73¢
Other Industries (21%)	21,128	12,123	57¢
Manufacturing (10%)	25,017	12,485	50¢
LABORERS (10% female)	$12,031	$ 7,452	62¢
Manufacturing (17%)	13,400	7,964	59¢
Other Industries (8%)	11,438	6,929	61¢
Construction (1%)	11,014	10,099	92¢
CRAFT WORKERS (4% female)	$15,776	$ 9,584	61¢
Other Craft (10%)	15,998	9,383	59¢
Blue Collar Supervisors (9%)	17,661	10,292	58¢
Metal Crafts (2%)	16,676	9,392	56¢
Construction Crafts (1%)	15,095	8,536	57¢
Mechanics & Repairers (1%)	15,024	9,282	62¢

SOURCE: Census Bureau, U.S. Department of Commerce, P-60 series, No. 118, 1978 data.

Chart 6

An Analysis of Income by Sex and Education Level

1979

Education level	Male Income	Female Income
Elementary	$12,400	$7,606
8 years	14,475	7,766
High School		
1 - 3 years	15,205	8,552
4 years	18,111	10,506
College		
1 - 3 years	19,376	11,861
4 years	23,996	13,430
5 years or more	25,858	16,694

The above data reflect income for full-time workers.

SOURCE: Census Bureau, U.S. Department of Commerce, P-60 series, No. 125.

STATEMENT OF ELEANOR CUTRI SMEAL, PRESIDENT, NATIONAL ORGANIZATION FOR WOMEN, INC.

Ms. SMEAL. I am glad to be here and I am glad you are having these hearings on affirmative action. As the President of the National Organization for Women, I am representing the largest membership organization in the United States composed of men and women who are dedicated to achieving equal political, legal and social rights for women.

We are very concerned about the whole affirmative action and equal employment opportunity area for minorities and women, especially under the proposed administrative policies of today. I am submitting to you official testimony from our organization on the subject at hand. In fact I am going to submit a corrected copy.

I would like to summarize that testimony and go beyond it. Frankly I feel that as I was sitting and listening to the hearings going on thus far that we are in a very serious political situation in which we are here defending proposals which just last year we thought should be improved. In other words all of the organizations here who are defending affirmative action knew and know that there must be more effort put into this area. Now we are trying to stave off devastation in this area.

I think we must always keep our mind on the major focus that we must be on the improvement, on the offensive, not just defending massive attacks of going backwards.

I would like to commend also Congressmen Hawkins for inviting the administration to appear. I agree with you that the refusal of the administration to appear before this subcommittee is indeed a matter of concern to all of us. So often I feel that we are fighting windmills, rumors, innuendos about what is going to happen or what is about to happen in the area of equal opportunity for minorities and women.

It is very difficult to prepare testimony about the policies of the administration when they are not specified clearly to us. I know and you know that on the rumor mill there is a massive cutback planned in this area. We do not know the exact nature of it. So our testimony is prepared in somewhat a general context, general because we do not know all of the specifics of a policy or program.

We think incidentally that this is a dangerous precedent, that Congress and the public cannot adequately comment on proposals before they are prepared and cannot be a part of a team dealing with problems in this area and solutions. So we feel that the lack of administrative officials here is indeed regrettable.

I have in the testimony presented familiar statistics. I think that too often those of us representing organizations to advance the rights of people have got to constantly present the statistics of how bad things are. Some day I would love to be able to sit in such a chair to tell you how good they are. But indeed we can and do in our testimony document the discrimination against women in the workplace, especially minority women.

All of you are familiar with the statistics. There is a major gap in pay. That gap widens as the educational levels decrease and also it widens for minorities, for those who are doubly discriminated against. But all across the spectrum females are discriminated against highly in the marketplace.

But affirmative action has had positive effects. As you well know in the last 10 years perhaps the most revolutionary thing that has occurred in our social and economic sector is the numbers of women entering the marketplace. The statistics are phenomenal. Today the majority of women work full time outside the home for pay.

And the statistics I think mask another factor that we must all deal with. Most women from now on will work outside the home for pay. Right now the overall average is 51 percent. But when you look at the younger categories it is over two-thirds and it is gaining. It does not matter if the woman is a parent or not. Women, by the economic conditions and also by the changed nature of the workplace itself and production, are working permanently outside the home.

We believe affirmative action is absolutely essential. There is no justification for the cutbacks. We are against the cutbacks. We actually believe massive improvement is necessary. You know, it is ironic. We live in a time when we need adjustments and creative thinking to deal with an increasing work force that is of gigantic proportions.

Instead of creative thinking we only have naysaying that is masked by all the cloud words, words like reverse discrimination, words such as we are trying to cut back the expenses and all the costs to small business of putting in numerous forms, questioning numerical goals and timetables instead of having not only these but also more solutions to massive new problems.

I have gone through what we believe are the proposed changes. We are against the cutbacks in the budget. They are hitting hardest of all the minorities and women. We are against the cutbacks in the area of equal opportunity enforcement. We think that the nonsense of the buzz words of overregulation and paperwork burdens are excuses for creating a situation of less opportunity for minorities and women in maintaining a cheap labor pool.

We think that to prove intent and to eliminate numerical data just makes it impossible to do so. Let's face it.

Essentially commitment to equality of opportunity must be measured by equality of result. If the intent of legislation is not to produce results, what is it for?

Not only do we feel that we must deal with affirmative action. We think we must deal with such programs as the EEOC's attempt to deal with comparable worth. Comparable worth for women must be measured. We must have new programs for its enforcement. It must be encouraged and increased, not reduced.

When you look at what is before us, I think you must talk in political terms. I could make all of the testimony legal and statistical. But I think that it does not meet the situation that is before us or the challenge that is before us.

President Reagan during his campaign promised the women of this Nation that he would eliminate sex discrimination and that he would go statute by statute, case by case, and that he would in fact advance women's rights. Instead, in the last 6 months we have had a case-by-case, statute-by-statute, rumor-by-rumor rollback in the area of enforcement of women's rights.

There have been to my knowledge no solutions, creative or otherwise, coming from the administration in the area of improving women's rights or increasing the enforcement against discrimination to women or minorities or blacks. There have been no statutory suggestions to my knowledge to toughen things to make it more enforceable or to improve conditions. If they do not like the present mechanisms, if they are to be honest to their own rhetoric, they will suggest improvements rather than absolute hatcheting and elimination of the existing programs.

Incidentally I believe they are fooling no one. If you look at the polls today there is a backlash among women to the current Reagan administration. Interestingly enough a Lou Harris poll of June 1981 revealed that if the 1982 elections were held today, men would vote Republican by a 40 to 45 percent margin while women would vote Democratic by a decisive 54 to 41 percent margin. The backlash we believe is based largely upon the female perception that Republicans are standing in the doorway blocking access to equal opportunity, equal pay and equal rights for women.

We are determined to fight this. We also are determined not to be divided and conquered. We believe questions such as Mr. Hatch put to Vilma Martinez about whether attention to improving discrimination against blacks cuts off access to Hispanic Americans or if he would put a similar question to me about whether paying attention to discrimination against minorities cuts off attention to women is a divide and conquer tactic. We will not tolerate that.

Mr. **Washington**. Did you call me Mr. Hatch?

Ms. **Smeal**. No, no, no. I said Mr. Hatch. Ms. Martinez in her testimony said that she was asked the question by Mr. Hatch. And basically I was trying to underscore that we in the women's movement, Mr. Washington, as you well know, are constantly asked: are we not taking away opportunities from minorities? The EEOC, if they are fighting discrimination against minorities, are they not therefore taking away from fighting discrimination against females?

What we are saying to all such questions is that we understand that these questions are a divide and conquer tactic and that we will all lose, those of us who are fighting discrimination, unless we stand united together. We believe incidentally that we are united, that the women's movement is united with the movements against racial and ethnic discrimination and that we will stand together.

Thank you very much.

Mr. **Hawkins**. Thank you, Ms. Smeal.

I was trying to read through your statement rather rapidly and I am not sure you dealt with this in your statement. Let me ask you this. One criticism of affirmative action is that the result is that women will displace men in the work force. What is your reply to that?

Ms. **Smeal**. Look at the current data. We are not displacing. As a matter of fact we are facing an industry and a work force condition of sex segregation. We are doing jobs primarily that only females do. That is the reality. We do not like sex segregation in the marketplace. We do not like being in jobs that are primarily low-paying. But that is reality.

So we are not displacing. We are just a new cheap labor market and obviously very necessary. We are flooding into the workplace.

Then on the other hand I will say that I think that concern is the same concern those people have for reverse discrimination. If reverse discrimination means keeping the status quo for white males, then I think that this is an unjust situation. If we are to be only concerned about males and their work needs and not women, then I think this is a Nation that is blind to the needs of one-half of its population and also blind to the resources and to the accomplishments of one-half of the Nation. We are a richness.

I do not think the economic pie, by the way, is a limited fixture and that when you cut it that you keep cutting it into smaller pieces. I believe that when women and blacks and other minorities are allowed to participate equally, we change the pie. We enlarge it. We make it a richer country and a richer place to be. I think the notion that there is a limited finite number of jobs does not meet the test of reality. Obviously the number is constantly expanding and does not meet the notion of what we know about society.

Whole new markets have been created by the increased participation of women in the workplace. For example, the entire fast food industry is dependent upon a changed notion of women's role in society. We are creating markets as we change in our workplace.

Mr. HAWKINS. Do you feel that there is a basic right to the opportunity for employment and that women have that right just as men do? Does the son of a poor man have the same right as Mr. Rockefeller's son? Should that right to earn a living and support a family depend on the social or economic status of the individual?

Ms. SMEAL. Yes, I think that every American has a basic right to a job in productive work.

Incidentally, I also believe that women who are homemakers are working full time and their economic recognitions must be a part of all of this. We do not recognize the work of a homemaker and that has got to stop. But women are working. Of course I think this is one of our basic philosophical rights. It does not mean that the world owes everybody a living. But on the other hand, what I mean by that is that a person must perform to standards. Obviously we can perform.

A nation can hardly tolerate the levels of unemployment among black youth as it is today in the cities. It is a disgrace to our Nation that we are not finding worthwhile work, do not have opportunities. We cannot say to some that welfare is bad when we have no jobs. And that is what we are doing. It is a very serious situation.

Incidentally, I do not think there should be age discrimination either. Right now the elderly female is probably in one of the most disgraceful plights economically of any class in our society.

Mr. HAWKINS. You touched on the subject of the administration officials' refusal at our invitation to testify openly in this forum. I suppose I join with you in the concern for what seems to be a conspiracy to avoid openly defending their policies.

Ms. SMEAL. Or even to enunciate them clearly. I do feel that we are fighting rumor constantly. Then when we make a challenge that this is what is intended, we are told that that is not what is intended. It makes it very difficult.

Mr. HAWKINS. I have tried to analyze the reason for it. I give them the benefit of having good faith and perhaps having some validity in some of the changes that they might wish to make. However, I think—and I am asking you whether or not you agree with this analysis—that the administration is formulating proposals or plans that they have not yet disclosed to those groups which will be most directly affected by them.

It is obvious that they have openly advocated budget cutbacks, that they have obviously opposed backpay as a remedy, that they have openly indicated their distaste with systemic case processing, that they intend to reduce the coverage quite extensively. These things are pretty obvious, it would seem to me, if you put the pieces together.

Assuming that is what they would have testified to had they come before the committee, would we be right in concluding that the message has gone out to those who would discriminate and to everyone who is hired by this administration that they do not believe in affirmative action, that they do not believe in the enforcement of the law, that it is all right to relax and to continue discriminating, and that if one does not actually participate in discrimination then one may permit it to take place? Is this clearly the message that goes out as a result of that failure to clearly state what they intend to do?

Ms. SMEAL. Absolutely, the message has gone out that they do not intend to enforce the law and that there is going to be a weakening. That message has gone out not only in employment but it has also gone out in title IX in the education area of sex discrimination.

Also then when you challenge that message—that no, that is not what is intended—you are put on the defensive because you did not have any real concrete proposal. You have what is in the area of rumor. If they do not want that message out there, they should correct it instantly. They should say that of course they do not intend to back away from the equal employment commitments of every prior administration and to their own rhetoric, their own statements.

I think it is very serious, the condition right now of the rumor mill, and its effect on opportunity for minorities and women is serious. There is no question about it.

Mr. HAWKINS. It just seems to me that there is a striking parallel between this and the Thatcher government in Great Britain. In drawing the parallel, it would seem that this policy of silence and uncertainty is precisely what gives rise to the type of disturbances afflicting Britain and the type of disturbances that could erupt in this country as a result of a lack of positive dynamic leadership for the people who see their hopes dashed, their lives threatened, their rights and privileges deprived, and are without any hope that the Government is attempting to remedy these ills.

The people assume the possible worst consequences without many times having the foundation for it, merely because there is a conspiracy of silence.

Ms. SMEAL. There is no question. It has two effects. One is that those who would like to discriminate for whatever reasons have a message, whether rightly or wrongly that it is going to be more permissible. Those who are the victims have the message that somehow there is no avenue of resort and those of us who are in the leadership of the communities who perhaps could provide the hope are left not even with a response because, in fact, we sometimes are made to look like we are fighting windmills. So, therefore, it gives condition to chaotic responses such as riots.

But incidentally it also gives a political message. That is why a lot of people do not see the women's constituency as rioting perhaps or even reacting as an organized constituency. I see these polls as indicating that women are reacting and they do understand ever so clearly what is happening to them. The message has also hit this constituency which has been less traditionally organized and they are having a political response.

I also believe that they are having the hopeless response and the anarchic response. All of these responses are present and it is very hard for responsible leadership to function in such an atmosphere.

Mr. HAWKINS. Thank you.

Mr. Washington, may the record indicate that no one believed that Ms. Smeal had accused you of being Mr. Hatch. [Laughter.]

Ms. SMEAL. No, I did not.

Mr. WASHINGTON. I think I am justified in being put out.

Ms. SMEAL. I was shocked when you said that.

Mr. Washington, I would like to thank you for your support of the Equal Rights Amendment as a State senator from Illinois.

Mr. WASHINGTON. I was very fortunate as a State senator. Each year your local chapter would grade us and I would always get 100 percent.

Ms. SMEAL. That is right, and we would know how we would grade you in relationship with Mr. Hatch. [Laughter.]

Mr. WASHINGTON. I think you are perfectly correct, Ms. Smeal, in couching your testimony in political language because that is what it is all about. I think you are perfectly justified in joining our chairman in bringing the administration to task for not providing witnesses here today to testify relative to these EEO matters that we are concerned about. I think that is the height of arrogance, certainly antidemocratic, and I think it shows lack of concern.

I am not that familiar with the manners of the mansion around here. I just got here. But I am of the opinion that matters like this insult the integrity of this House and committees, that matters like this should be brought to the attention of the Speaker and that the Speaker should address the question to the President and make it very clear that we run this House, we have legitimate oversight responsibilities and that if anybody directly or even remotely infringes upon that integrity, then he should know it.

I think the American people should know that they are shooting dice under a hat. We do not know what they are doing and all at once they are going to come out with some rules, hopefully no worse than those that you enunciated, Mr. Chairman.

I think the Speaker should know about this, and I am going to see that he does know about it, Mr. Chairman.

Ms. **Smeal**. I think that we have been too moderate. I asked Mr. Flemming during the break if he had ever known of a case in his 4 years of experience, because I obviously have less experience here than he, and he said he has never known of a case that this was done in this manner. So I think we should be quite outspoken in our objections. I am delighted that you are taking this matter to the Speaker. I feel that right now the legislative branch is under some attack from the executive.

Mr. **Washington**. Not only that, but Mr. Reagan boasts of a mandate which is very spurious. I know I have a mandate in my district. I got 96 percent of the vote. That is strong enough for me to object to what I consider to be an infringement.

Ms. **Smeal**. That is sort of solid.

Mr. **Washington**. There is bruited about a constitutional amendment to abolish affirmative action. Mr. Reagan presumably is buttoning that onto his spurious mandate. How do you feel about this so-called mandate that he has?

Ms. **Smeal**. I do not believe it exists. I believe there was no mandate on social issues for this election. This was an election against the current economic conditions, against the Middle East situation, and against the incumbent presidency. There was none on social issues.

Incidentally, poll after poll reflects this. I do not believe American people want to go away from their commitment to equal rights. I think that is the reason why the polls are starting to show, for example, the women's backlash.

Mr. **Washington**. It might be that the women will save us all if you keep multiplying like fishes and loaves in terms of your opposition to Mr. Reagan.

I wonder if you would clear up a misconception for me or embellish a point. In my district there are many working women, most of them minority, and many of them either support families alone or supplement incomes of their husbands, who, because of discrimination, are usually not adequately paid. So the women then have to go to work and they are not adequately paid because of discrimination, so they get it from both ends. It is particularly harsh when women are the sole providers for their families.

Would you comment on that in reference to this thrust for equal pay and affirmative action?

Ms. **Smeal**. The myth that women are not working for money I thought we had destroyed. But it continuously persists that somehow our jobs are not essential. Of course they are essential. As you just said the minority woman supporting a family is essentially, because of the economic conditions, living in a state of poverty. She is making less than 59 cents on the dollar which a white woman would make and she is essentially forced, she and her children, into poverty.

It is a situation which forces many onto welfare. It is a vicious circle. They cannot afford to work because the pay is so low that they cannot in fact provide for a family.

Essentially the feminization of poverty is becoming a well-known factor. One major national commission came to the conclusion that by the year 2000 people, in poverty will be essentially women and their dependents. Of course a large sector of that will be minority women.

Mr. WASHINGTON. Your statistics on the back of your submission bear out just how potent that observation is.

I have one last question, somewhat unrelated. I am struck by the similarity between the emotionalism which is characterized by opposition to the Equal Rights Amendment and the same emotionalism which seems to be surrounding this attack upon affirmative action. Do you think there is developing in this country a mood which is anti-female and anti-minority?

Ms. SMEAL. I do not think it is in the general population. It is possible. In fact one of the things that worries me is if it is going to become permissible to return to racist and sexist jokes at the rate we are going. It is allowing antisocial behavior against minorities and women.

I happen to feel, however, that this is no more than an attempt on the part of those who profit to keep their costs down. I believe, and have always believed, that the Equal Rights Amendment is an economic issue. It essentially is about money and pay and jobs. And those who are stopping it are primarily the spokespersons of the vested interests, the corporate world that profits.

That is why 75 percent of the State legislators who voted against the ERA are members of the Republican party, many of whom are business spokespersons on the floor of the State legislatures. I think that the attack on affirmative action is nothing more than an attempt to coddle employers who profit from taking advantage of the underprivileged of our society. I do not think we should treat it as anything else but that.

If you look at where the ERA has not passed in our country, it is in those States primarily that have all kinds of tax shelters for business and which in fact are primarily right-to-work States: primarily, States that have less enforcement mechanisms for the protection of the average person and workers.

Mr. WASHINGTON. So we end on a political matter in that the coalition that Ms. Martinez spoke of and that you speak of is absolutely necessary.

Ms. SMEAL. That is right. There must be a coalition. I also think that we should not forget for a minute that those who would like to divide us would like to put it on emotional terms and take our money away from the dollar and the bottom line. Because when people understand that when those people are saying the ERA destroys the family, when they play it on emotional terms, they take it away from the dollar. They take it away from what is the real impact of discrimination and they help encourage people to be against their own interests.

That is why I think we should keep the issue right where it is. Affirmative action or the attempt to gut it, the attempt to avoid enforcement is an attempt to keep wages down, to have a profit margin that is bigger. I feel that if there were no vested interests that profited from discrimination that we would solve these problems much sooner.

Mr. WASHINGTON. So this conspiracy of silence in which this committee is bypassed by the administration is all part and parcel of that.

Ms. **Smeal**. I think it is very hard for them to say that they are against rights for minorities or women. I think that they have to explain it on so many other things. That is why they have so many buzz words. And I do believe that one of the reasons that they are not stating their plans so clearly is it is more difficult. It silences the opposition.

Mr. **Washington**. Thank you, Mr. Chairman.

Mr. **Hawkins**. Thank you, Ms. Smeal, for your testimony. You have been very helpful. We wish to commend you and the National Organization for Women for the very excellent job that you are doing.

Ms. **Smeal**. Thank you. We thank you for the opportunity to appear.

Mr. **Hawkins**. The final witness today is Eleanor Homes Norton. She is appearing in a new capacity today before this committee. Mrs. Norton is now a Senior Fellow of the Urban Institute, and was formerly the Chair of the Equal Employment Opportunity Commission. Mrs. Norton also is a personal friend.

I am sure you must be somewhat amused as you appear before this committee today. Formerly we appeared to be somewhat critical, even of the EEOC under the previous administration. You must be amused at what we are now going through. Obviously, we would like to reinstate you and have you in your former position.

I was very proud of some of the statements you made the other night on TV. I happened to tune into it and saw you. I said then what I have sometimes said behind your back, but will say in front of you today. I said to my wife, "there is a wonder woman."

So with that, we are delighted to have you before the committee today and to welcome you in your new position.

Ms. **Norton**. Thank you very kindly, Mr. Chairman.

[The prepared statement of Eleanor Holmes Norton follows:]

PREPARED STATEMENT OF ELEANOR HOLMES NORTON, SENIOR FELLOW, URBAN INSTITUTE

Mr. Chairman, members of the subcommittee, I am Eleanor Holmes Norton. I am a past chair of the Equal Employment Opportunity Commission and currently a Senior Fellow at the Urban Institute in Washington, D.C., where I am writing a book on equal employment.

I want to begin by expressing my appreciation to this Committee and especially to you Mr. Chairman for holding these hearings and to commend the initiative they represent. This Committee under the able and tough leadership of Chairman Hawkins has been an indispensable vehicle for insuring that the agencies involved approached enforcement with the seriousness and efficiency Congress intended. Your oversight has been strong and evenhanded in Democratic and Republican administrations alike. Your unfailing posture has been to goad the agencies toward greater efficiency and tougher enforcement. But I doubt you have ever confronted a situation such as has developed since the new administration has come into office. I doubt that you have held hearings during a period where the very future of the equal employment laws was being questioned. For these hearings come at a time when the actions of the administration and several proposals before the Congress have created an almost unanimous loss of confidence among public interest groups, civil rights groups, and women's rights groups that the civil rights laws will be enforced fairly and forcefully. Nor, interestingly, have these measures been put forward at the initiative of the business community, and many have not met with their approval. I found in my experience at the EEOC that many employers today are committed to the law and accept it as a fact of life in doing business just as they accept similar statutes, such as the National Labor Relations Act, the Federal Communications Act, and other regulatory statutes. I am certain that business is embarrassed by radical proposals such as Senator Orin Hatch's proposed Equal

Protection Amendment to the Constitution, which, among other things would raise to constitutional dimensions the barring of goals and timetables, a device which business generally endorses. It is hard to take seriouly most of the proposals that have surfaced, many of which appear to be patently illegal, highly unfeasible, or so extreme that I cannot believe that they will survive scrutiny. These include, among others proposals that would effectively abolish the OFCCP and the EEOC except for federal EEO enforcement and conciliation in individual cases at EEOC, while making the Justice Department somehow responsible for all EEEO enforcement (Wednesday Club composed of some Republican members of Congress); a ban on lawsuits by the EEOC (EEOC transition team); and amendment to Title VII to overturn the Supreme Court decision in the *Weber* case, making it impossible for business to do effective voluntary self-enforcement without waiting to be sued (introduced by Representative Robert Walker); and a measure to require specific intent before discrimination may be established under Title VII (Hatch constitutional amendment)—to name some of the more radical and unworkable of the proposals that have surfaced from the Congress. One of the unfortunate effects of these extreme proposals is that many minorities and women will assume that proposals to weaken the law and retard enforcement have been advanced at the request of business. In point of fact, new revised regulations for the Office of Federal Contract Compliance to overide those passed during the last administration have deeply divided the business community and distressed most business people and their lawyers. While many companies desired changes at the OFCCP, the administration proposed some measures that weaken enforcement, with which business was satisfied, and failed to deal with others that concerned companies. Minorities and women, on the other hand, read these proposed changes as a general declaration of war by the new administration against firm enforcement in civil rights far beyond the OFCCP. It was the wrong signal to send to minorities and women who, though skeptical about the administration's commitment, had adopted a wait-and-see attitude. And it was the wrong signal to send to business who had hoped for a fruitful working relationship.

Because the proposed revised OFCCP regulations have come to symbolize problems in equal employment enforcement in the new administration, I want to use them to indicate major problems that have emerged in the administration's basic approach to enforcement of the equal employment laws. Then I want to make some comments about the EEOC's systemic program, because I believe it is that part of the commission's mandate that is most vulnerable without sustained and expert internal management and support from the administration.

THE ADMINISTRATION'S APPROACH TO REVISING THE BASIC REGULATIONS OF THE OFCCP

The proposed revised regulations have drawn fire from all sides. This is not the time to engage in a detailed analysis of the proposed revised OFCCP regulations. Instead I have selected two sections from the proposed regulations because they illustrate the confusion and unsatisfactory solutions that result when a major enterprise like revising the basic regulations of an agency is undertaken with a blunt and unrefined instrument and without due deliberation and consultation with all who are affected. Two sections that typify the problem with the regulations are the proposed elimination of most companies that now file written affirmative action plans and a proposed exemption of some companies from any OFCCP oversight for 5-year periods under certain conditions.

The thresholds for coverage by affirmative action plans are proposed to be raised from companies with 50 employees and contracts of $50,000, or more, to only those with 250 employees and one million dollars in contracts, or more. Protected groups have storngly objected to this proposal because, by OFCCP's own estimate, 75 percent of companies would no longer be covered. OFCCP justifies this huge reduction in coverage, saying that three-fourths of all employees now covered by written plans will continue to be covered. OFCCP overlooks the fact that 80 percent of all new jobs are created in companies with 100 or fewer employees; that it is far easier for business and for government to work within a context of job expansion than later, when years of discriminatory recruitment and promotion must be undone; and that, in effect, this proposal, by exempting most government contractors, gives a license for non-compliance with the law.

Nor has this proposal satisfied business. While recognizing the obvious savings to smaller contractors, business scoffs at the OFCCP savings estimate of $13 million when compared with the $942 million per year the 500 largest federal contractors say they spend annually on OFCCP affirmative action requirements.

Similarly, all concerned have criticized the new OFCCP proposal to exempt contractors from compliance reviews where a facility has undergone an on-site compliance review, has an OFCCP-approved written affirmative action program or has "a linkage agreement with the Employment and Training Administration or . . . a training program . . . provid[ing] reasonable opoortunities" for the protected groups. The groups criticize the period as too long, given changes that often occur in the labor force, the absence of monitoring to assure that the conciliation agreement negotiated during the compliance review is more than a piece of paper, and the ETA program concept because these programs most often deal in entry level jobs requiring little skill where minorities and women are often already represented and where the match between employment opportunities and affirmative action requirements would be highly unlikely. Business has met this proposal with deep skepticism, questioning the authority of the OFCCP to require a linkage agreement from companies in compliance with the Executive Order and questioning whether companies will be able to gain the exemption with out compliance costs in excess of those incurred under the present process.

While it is not unusual for business and protected groups to oppose government equal employment proposals, I do not know when I have seen such disenchantment on both sides. I believe more acceptable and reasonable proposals could have been produced had the administration adopted a more thoughtful and orderly process. It must be remembered that these are the basic regulations which govern all the major substantive and procedural actions of the agency. The OFCCP in the last administration worked on the regulations for two to three years. This administration sought to revise the regulations in more like two to three months, even before the director of the OFCCP was on the job, apparently to keep the regulations of the last administration from going into effect. This was totally unnecessary. The new administration could allow the regulations to become final while explicitly publishing its reservation of its right to make changes. Nor would this inconvenience business, and I seriously doubt business would object because the Carter administration regulations are not much different operationally from procedures already being used by business to comply with OFCCP requirements. For the most part the regulations codified actual OFCCP procedures. Thus, allowing these regulations to go into effect would have little effect on business while providing the time for the deliberation and creative problem-solving this complicated area requires.

Given more time for study, consultation, and comment, the OFCCP might still break through some of the tough problems of cost and efficiency that appropriately concern the agency. In my experience at EEOC I found that enforcement and efficiency are not mutually exclusive. To the contrary, enforcement results often depended upon measures to improve efficiency. One dramatic example of this was the more than tripling of the remedy rate that resulted from the efficiencies of Rapid Change Processing at EEOC. The old investigating process virtually destroyed the possibility for remedy, producing a 14 percent remedy rate and two-year processing time. When I left the agency, the remedy rate was 50 percent and the processing time four months, as employers embraced a system which allowed them to settle cases early before back pay accumulation had become a deterrent to remedies. At the same time, the faster process prevented costly and lengthy entanglement with the administrative process and the aging of cases, the single most important enemy of remedies and the chief cause of EEOC's historical backlog problem.

Thus, I am deeply sympathetic with business and administtation concerns to make the OFCCP process less burdensome and less costly to employers. The problem is that the new revised OFCCP regulations do not do this, as business bitterly indicates. Moreover, my experience at EEOC convinces me that this can be done without sacrificing enforcement, but it is clear that the administration's version of the regulations would seriously downgrade effective enforcement.

Without, again going into detail let me indicate one approach to both of the proposed measures I discussed above—the raising of the threshold amount and number of employees and the 5-year exemption. In order to achieve efficiencies an ax has been clumsily applied in the approach taken in the proposed revised OFCCP regulations. In the case of coverage, smaller businesses where the lion's share of new jobs are being created, are automatically exempted, no matter how serious their noncompliance. In the case of the 5-year exemption, an acceptable plan is sufficient to qualilfy, without reference to its actual effectiveness so long as there is linkage to training programs, which are often doubtful contributors to the goals and timetables for jobs in the AAP's today for which there is under-representation of minorities and women. A more rational approach to both problems might well be to publish specific criteria for deciding which companies get compliance reviews on what timetable. Central to the criteria in such a formula should be demonstrated performance in improving EEO performance, but other factors would clearly also be relevant, such as rate of turnover, plans for expanded employment, and the like. In the new systemic program we developed at the EEOC, performance was the central criterion used to choose systemic targets. This meant that scarce government resources were concentrated on the worst offenders and that businesses had an incentive for voluntary enforcement that is the backbone of law enforcement. In selecting targeting criteria we were careful not to exempt small companies altogether so that we would not get the results inevitable under the proposed revised OFCCP regulations—a disincentive to compliance, a flouting of the law by all but larger companies, and resentment among larger companies that no matter how much they improve, their size and visibility guarantee enforcement measures against then that will not be taken against smaller companies. This approach to choosing regulatory targets won strong support from both protected groups and business. It suggests that especially in procedural matters such as thresholds for coverage and choice of targets for enforcement, two of the most controversial sections of the new revised regulations, agencies can achieve some measure of agreement from broad sectors in the affected public or, at the very least, can avoid the polarization among business, the protected groups, and the agency that now characterizes discussions about the new proposed OFCCP regulations.

There are many other ideas that should be considered in a process as comprehensive as the revision of the basic regulations of an agency. One was suggested to me by a lawyer who is an important legal advisor to a number of companies and who finds the proposed revised regulations totally unacceptable. He complained that companies were frustrated by what they believed were sometimes arbitrary goals assigned by OFCCP personnel. What did I think, he inquired, of an approach that allowed a company to meet goals from its own training program for professionals, technicians, and managers, presumably in a process of trade-off of the frequency of full-scale compliance reviews. I knew well that protected groups are just as critical of the compliance review process but for the opposite reason—that they believe goals are negotiated down too often. An approach that links goals to the company's own training program, assuming it provided an adequate pool, would eliminate much of the controversy about the adequacey of goals. The training program would provide the pool to fill the goals and business would have little excuse for not filling its goals.

I am not in a position to endorse a proposal of this kind without studying its details. But the lawyer who made the suggestion is someone I respect and the approach seemed promising enough as a general matter to test with an EEO lawyer for one of the protected class organizations. Although she is an especially tough advocate for the protected class point of view, she immediately understood the trade-off and was intrigued by the idea. I never discussed her reaction with the lawyer who suggested the idea; nor have I pursued it further with her. In the context of the present short-circuited revision process, there seemed to be little room or time for this kind of in-depth rethinking. But if the administration is serious about producing workable regulations that improve the process, it will have to cease playing "Beat the Clock" in an effort to patch together a set of regulations before the present ones become effective.

The proposed rewritten Executive Order by Representative Paul McCloskey has raised some of the same species of problems as those presented by the proposals of the Reagan administration. The difference of course is that Representative McCloskey during his years in the Congress has had a civil rights record and reputation. He was strongly supportive of me while I was at the EEOC and went out of his way to take an interest in the agency. He supported both my management reforms and firm law enforcement approach. I have been preparing a response to his proposals, which he sent me by mail. But I have such respect for his past civil rights record, I think it important to go on record as to the approach outlined in his revised executive order. The most serious problem with the McCloskey proposal—and it raises many problems—is its assumption that the single remedy of debarment would yield effective enforcement by the OFCCP, and the McCloskey proposal does serious harm in other ways, such as decreasing the OFCCP's staff from 1,500 to 300 people. But the underlying assumption that a strong debarment policy is all there should be to OFCCP enforcement would of course go far toward guaranteeing no enforcement. It is the same thing as prescribing the death penalty for larceny or relying on nuclear weapons alone for defense. In such cases juries don't convict and nations don't use nuclear weapons. The legal process and the nation state, armed with only ultimate weapons are, for that reason, rendered defenseless. The McCloskey proposals stem from this basic fallacy. I hope that the Congressman will withdraw his proposal and involve himself in open-minded discussions such as are also necessary at the OFCCP so that unworkable measures by both can be corrected.

Civil rights issues are always difficult for policy makers. They are even more difficult when considerations of efficiency, cost, and paper work must be taken into account, as surely they must. The OFCCP process is being viewed as a test of this administration's commitment to civil rights. It is foolish to rush through it with half-baked proposals equally unsatisfactory to protected groups and business. The administration should allow the old regulations to go into effect, since they largely memorialize existing procedures, while it deliberates and consults to improve the efficiency of the process, reduce cost and paper work, and preserve strong enforcement.

SYSTEMIC AND CLASS ACTION WORK AT EEOC

I want to focus my discussion of the EEOC on the need to continue and strengthen systemic enforcement, which, you may recall, was one of my chief priorities while at EEOC and one of the primary concerns of this Committee. I believe that it is the emphasis that may be most endangered at the EEOC. There is little incentive for a new administration to change Backlog Change Processing, which had reduced the Commission's backlog by two-thirds for the first time in its history by the time I left the agency last February, or Rapid Change Processing, whose efficiencies had thus far kept new backlog from accumulating. But proposals to transfer the enforcement authority Congress gave EEOC back to the Justice Department and the administration's approach to systemic work as evidenced by the revised OFCCP proposals, cast a shadow over the future of systemic work by the federal government.

The systemic program at EEOC had to be painstakingly built from the ground up. I was especially fortunate in being able to attract Michael Middleton and Fred Dorsey, respectively to head the program, both excellent trial lawyers with a combination of deep experience in the field and demonstrated management ability that won them respect throughout the agency and among those who deal with the agency. Their efforts and the work of district directors in the field resulted in over 100 commission-initiated charges in two years' time and hundreds more "ELIs" or individual changes targeted for class action treatment under Commission criteria.

It is difficult to overestimate the importance of continuing and strengthening this work. For of the statutory tools given EEOC by Congress, this work alone offers a strategy for overcoming structural problems minorities and women suffer in the work force. Let me illustrate with an example of a problem that systemic work alone can approach—a dangerous and largely unnatural decline in black male labor force participation.

Though Congress and the public are well aware of such stubborn problems as minority unemployment and teenage unemployment, there is almost no public discussion today of a dangerously abnormal and long-range decline in labor force participation among black males. Black females have had higher unemployment for many years but have shown a very healthy, rising labor force participation, which exceeds that of white women, 53.5 percent to 50.6 percent in 1979. It is true that both black and white males have declining work force participation, but, it would appear, for quite different reasons. White men are taking advantage of early retirement benefits, but judged by the ages of black men not in the labor force, no such normal phenomenon accounts for declining black male participation. Today 40 percent of black males are not in the labor force compared with 26 percent white males.

The fact is that black men began in 1948—the first year in which such statistics were kept—with greater labor force participation than white men, at 87.3 percent, a full point higher than white male labor force participation. But a wide gap has developed, with the positions of white and black males now reversed. By 1979 a gap of 6.7 percentage points between black and white males had opened—78.6 percent participation for white males to 71.9 percent for black males.

The decline in labor force participation for black men has been twice as steep as for white men—between 1948 and 1979 a 7.9 percent decline for white men but a 15.4 percent decline for black men.

What is most serious is that these figures typify not only the teenage and older years, when such decline might be more expected, but the prime working ages of 25 to 54. In the years for which figures were available, 1954 through 1978, the decline for black men (96.2 percent down to 84.5 percent) was twice as steep as for white men (97.5 percent down to 92.1 percent). The two groups show about the same ill and disabled rate—20.1 percent for black males, 19.6 percent for white males, but almost 25 percent more black men than white men reported they were discouraged (19.1 percent blacks compared to 15.8 percent whites).

There are of course multiple causes for this problem, such as education and training deficiencies. But one of the most important reasons is probably the tendency of black males to be concentrated in older declining industries, a problem partly of systemic discrimination that can be remedied only by systemic work by the government.

For example, blacks have a 9 percent labor force participation but make up 15 percent of the labor force in the two industries which are in deepest trouble in this country—auto and steel. The participation rates of black men in declining industries is increasing about as much as in growing industries. Black males participate in declining industries at a rate three and four times their participation rate in the labor force.

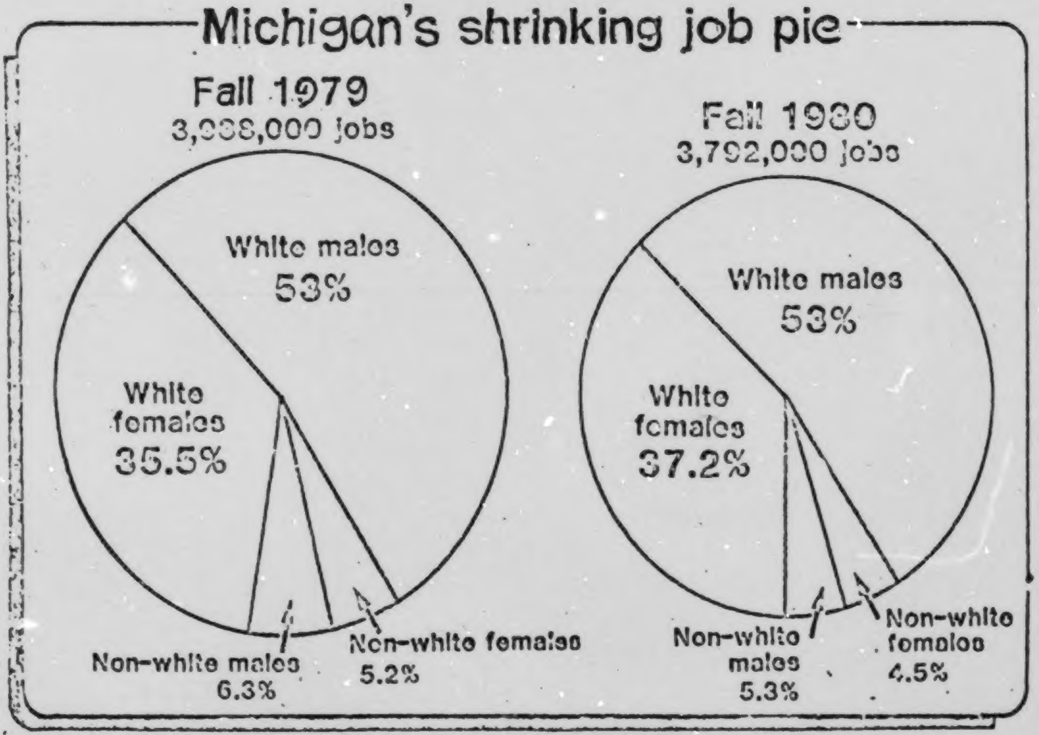
One way to see the effect of these trends on the overall employment problems of black males is to look at the job distribution in a state whose economy has been deeply effected by its reliance on declining industries. The graph attached to my testimony, entitled "Michigan's Shrinking Job Pie," shows a loss of almost 200,000 jobs in that state in one year between fall 1979 and fall 1980. There was a 1.7 percent increase in white female employment, almost surely due to openings in female-stereotyped jobs, although non-white females, who consistently show higher rates of unemployment than other groups, lost .7 percent. Black males lost a full percentage point. But what is most significant about this chart is that it indicates that white males maintained their 53 percent share of the labor force even in a crumbling economy.

The explanation most often offered for trends showing black male decline in the labor force—the availability of more liberal disability payments, education and training needs, etc.—are only part of the answer. Black males in Michigan are often trained industrial workers and presumably many white males hold similar jobs in this highly industrialized state. It would appear that white males more easily transfer these same or similar skills from declining industries to those where there is hiring. Systemic work which encourages affirmative recruiting can be important to equalize opportunities for black males whose declining work force participation can not be considered tolerable.

In discussing the black male decline in labor force participation, I mean to do more than draw to your attention a neglected problem. I want to suggest that part of its solution depends upon strong systemic work by the federal government, especially the EEOC.

This was the toughest program to build at EEOC. The work is highly technical and requires constant managing by legal experts with good management skills. Because systemic work is discretionary, unlike individual cases, it is vulnerable to neglect, policy shifts, and of course inadequate staff work. A strong systemic program at EEOC will require oversight from the public and from this Committee. You never hesitated to keep my feet to the fire when I was at EEOC. I know you will continue in that tradition.

Despite differences among various administrations, there has been a rough consensus supporting affirmative action among the Congress, the executive and the judiciary for almost a generation. Moreover, the remedies have had bipartisan support from Republicans and Democrats alike. Indeed affirmative action developed into the strong remedies we know today during the Nixon-Ford years. The remedies have been on a continuum of stronger and stronger effectiveness until today when they are considered highly effective against job bias. It would be a tragedy to allow the government consensus on affirmative action to crumble now because of wild proposals submitted by some members of Congress or inadequacies in the proposals and programs of agency officials. There is much public confusion and concern about affirmative action, but there is not yet national polarization. The Congress, the President, business and protected groups should work together to increase public understanding of these vital remedies, imporve their efficiency, lessen their cost, and guarantee the integrity of their enforcement.



Drawing by Detroit News staff artist Robert Richards from figures compiled by the Michigan Employment Security Commission.

STATEMENT OF ELEANOR HOLMES NORTON, SENIOR FELLOW, URBAN INSTITUTE

Ms. NORTON. I want to begin by saying that it would never have crossed my mind when I was Chair of the EEOC to not appear before this committee and I might say before any committee of the U.S. Congress when members of the administration might have felt that there would be some criticism.

My name is Eleanor Holmes Norton. I am a senior fellow at the Urban Institute where I am writing a book on antidiscrimination remedies and affirmative action on a grant from the Rockefeller Foundation.

I want to begin by expressing my appreciation to this committee and especially to you, Mr. Chairman, for holding these hearings and commending the initiative they represent. This committee has been an indispensable vehicle under the able and tough leadership of Chairman Hawkins for insuring that the agencies involved approach enforcement with the seriousness and efficiency Congress intended.

Your oversight has been tough and evenhanded in Democratic and Republican administrations alike. Your unfailing posture over the years has been to goad the agencies toward greater efficiency and tougher enforcement.

But I doubt that you have ever confronted a situation such as has developed since the new administration has come into office. I doubt that you have held hearings during a period when the very future of equal employment opportunity was being questioned.

For these hearings come at a time when the actions of the administration and a number of retrogressive proposals before the Congress have created an almost unanimous loss of confidence among public interest groups, civil rights groups, and women's rights groups that the civil rights laws will be enforced fairly and forcefully. Nor interestingly have these measures been put forward at the initiative of the business community and many have not met with their approval.

I found in my experience at the EEOC that many employers today are committed to the law and accept it as a fact of life in doing business just as they accept similar statutes such as the National Labor Relations Act, the Federal Communications Act and other regulatory statutes. I am certain that business is embarrassed by radical proposals such as Senator Orrin Hatch's proposed equal protection amendment to the Constitution which, among other things, would raise to constitutional dimension the barring of goals and timetables, a device which business endorses.

It is hard to take seriously most of the proposals that have surfaced, many of which appear to be patently illegal, totally unfeasible or so extreme that I cannot believe they will survive scrutiny. These include proposals to abolish the EEOC, the Office of Revenue Sharing, and the OFCCP, leaving EEOC only the Federal EEO enforcement and some conciliation power, taking us back almost 15 years while making the Justice Department somehow solely responsible for EEO enforcement; a moratorium on lawsuits by the EEOC; an amendment to title VII to overturn the Supreme Court decision in the *Weber* case, making it impossible for business to do voluntary self-enforcement without waiting to be sued; and a measure to require specific intent before discrimination may be established under title VII—to name some of the more radical and unworkable of the proposals that have surfaced before the Congress.

One of the unfortunate effects of these extreme proposals is that many minorities and women will assume that proposals to weaken the law and retard enforcement have been advanced at the request of the business community.

In point of fact the new regulations at the Office of Federal Contract Compliance to override those passed during the last administration, for example, have deeply divided the business community and distressed most business people and their lawyers. While many companies desire changes at OFCCP, the administration proposed some measures that weaken enforcement with which business was satisfied and failed to deal with others that concerned companies.

Minorities and women, on the other hand, read the proposed changes as a general declaration of war by the new administration against firm enforcement in civil rights, far beyond the OFCCP. It was the wrong signal to send to minorities and women, who, though skeptical about the administration's commitment, had adopted a wait-and-see attitude. And it was the wrong signal to send to business who had hoped for a fruitful working relationship.

Because the proposed revised OFCCP regulations have come to symbolize problems in equal employment enforcement in the new administration, I want to use them to indicate a major problem that has emerged in the administration's basic approach to the equal employment laws, as I see it. Then I want to make some comments about EEOC's systemic program because I believe it is this part of the Commission's mandate that is most vulnerable without sustained internal management and support from the administration.

The proposed revised OFCCP regulations have drawn fire from all sides. For example the thresholds for coverage by affirmative action plans are proposed to be raised from companies with 50 employees and $50,000 in contracts to only those with 250 employees and at least one contract of $1.0 million.

Protected groups have strongly objected to this proposal because by the OFCCP's own estimates 75 percent of the companies would no longer be covered. OFCCP justified such a huge reduction in coverage saying that three-fourths of all employees covered by written plans will continue to be covered. OFCCP overlooks the fact that 80 percent of all new jobs are created in companies with 100 or less employees and that it is far easier for business and for Government to work within a context of job expansion than within a work force where undoing years of discriminatory recruitment is necessary.

I want to skip some of this in light of lack of time.

The interesting thing about the proposal that would take 75 percent of the companies out of the OFCCP program for all intents and purposes is that business scoffs at the proposal in the same way that minorities and women do.

Mr. **Hawkins**. Mrs. Norton, if I could interrupt there, is it your understanding that this takes them out of even the requirement for reporting as well?

Ms. **Norton**. That is right, for preparing an affirmative action plan.

Mr. **Hawkins**. There is no reporting even? Not only would they not be covered but they would not even have the requirement to report?

Ms. **Norton**. They would not have the requirement to submit a written affirmative action plan.

Mr. **Hawkins**. So even if that phase of it were to be left in, at least there would be some incentive for them to do something constructive. Taking that away as well completely removes any incentive, I would assume. It actually builds in a disincentive.

Ms. **Norton**. I think that is just the word. We were mindful at EEOC when we were drawing criteria for choosing systemic targets that although you want to get the biggest bang for the buck, the last thing you want to do is tell smaller companies, which are the majority of the companies in the United States, that you will never bring a systemic complaint against them, because that would be a license to flout the law. So we made it clear that the criteria would factor in size on occasion but that we would also initiate complaints against smaller companies where we believed that they were seriously in violation and where they would have an impact.

Here they are saying, all of you folks, which is most of you folks as it turns out, who are not in the Fortune 500 virtually do not have to file these plans. There have to be better ways.

Mr. **Hawkins**. In your experience what would be the likelihood that they would have been brought before the agency in any capacity?

Ms. **Norton**. One of the reasons why this proposal is so laughable is that business representatives tell me that OFCCP, because it did not have specific criteria for when to do compliance reviews, never got around to the smaller companies anyway, but at least they had to file a plan.

This way you never get around to reviewing them and they do not have to file a plan and of course it is most of the companies in the United States. Now I can understand the concern with efficiency but, as I will suggest later on, there are ways to go at this without cutting the legs out from under enforcement, as I believe this proposal does.

Business, who I suppose people reading the proposed revisions might think would be satisfied with this proposal, has scoffed at it because OFCCP says it will save only $13 million in reporting requirements. Business says that for the largest companies alone it costs them $242 million a year in OFCCP compliance, so they think that the OFCCP has done nothing by this proposal.

Another seemingly probusiness proposal has drawn deep skepticism from business and that is this notion of a 5-year exemption, if a business has first an on-site review, then produces an acceptable affirmative action agreement and then signs an agreement obligating them to hire some people from an employment training program, one of the ETA programs in the Department of Labor.

The protective groups, of course, fear the long period with no review. The plan that is produced could be a paper plan that for 5 years a company does not produce on and yet gets no review. And the ETA program proposal is almost laughable, since of course the ETA training programs are trying to train very often unskilled people for entry-level jobs where minorities and women most often find work anyway.

So to hook those people up with big companies for affirmative action purposes is to do nothing. They will not fill their goals and timetables out of ETA training programs. Business questions the legality of the whole ETA linkup. They think OFCCP will use it to blackmail them and they have thus found this no relief at all.

While it is not unusual for business and protective groups to oppose Government equal employment proposals, I do not know when I have seen such disenchantment on both sides. I believe that more acceptable and reasonable proposals could have been produced had the administration adopted an orderly process. It must be remembered that these are the basic regulations which govern all of the major substantive and procedural issues of the OFCCP.

The OFCCP in the last administration worked on its regulations for 2 to 3 years. This administration sought to revise the regulations that had only recently been passed in more like 2 to 3 months and even before the director of the OFCCP had come on the job, apparently to keep the regulations of the last administration from going into effect.

This was totally unnecessary. The new administration could easily allow the regulations to become final while explicitly publishing its reservation of its right to make changes. Nor would this inconvenience business. The Carter administration regulations are not operationally much different from procedures already being used by business to comply with OFCCP requirements.

For the most part the regulations codify actual OFCCP procedures. Thus allowing regulations to go into effect would have had little appreciable effect on business while providing the time for deliberation and creative problem solving that this complicated area requires.

Given more time, study and consultation, the OFCCP might still break through some of the toughest problems. In my experience at EEOC I found that enforcement and efficiency were not mutually exclusive. To the contrary, enforcement results often depended upon measures to improve efficiency.

One dramatic example of this was the more than tripling of the remedy rate that resulted from the efficiencies of Rapid Charge Processing at EEOC. The old bureaucratic investigatory processes virtually destroyed the possibility for remedy, producing a 14-percent remedy rate and a 2-year processing time for the average case.

When I left the agency last February the remedy rate was 50 percent and the processing time 4 months, as employers embraced a system which allowed them to settle cases early before backpay accummulated, thereby becoming a deterrent to any backpay at all. At the same time the faster process prevented the aging of cases, the single most important enemy of remedies and the chief cause of EEOC's historical backlog problems.

Thus I am deeply sympathetic with administration and business concerns to make the OFCCP processes less burdensome to employees. The problem is that the new revised OFCCP regulations do not do this, as business bitterly indicates. Moreover my experience at EEOC convinces me that this can be done without sacrificing enforcement. But it is clear that the administration's regulation would seriously downgrade effective enforcement.

In the next part of my testimony, which I am not going to read, I suggest that another way, a better way to approach the problem OFCCP was aiming at, which was to do fewer compliance reviews clearly, would be to peg compliance reviews to published criteria of which actual performance would be central. I can understand how you cannot, of course, efficiently do compliance reviews all the time, everywhere, and that the compliance reviews are indeed often costly for business.

But a criterion that is so blunt an instrument that it simply eliminates most of the companies is hardly the way to go at so serious a problem. If in fact past performance determines whether or not you will get a compliance review and on what timetable, then two things are accomplished.

First, of course, you reduce the universe of people on which you do compliance reviews. But most importantly you offer an incentive to business to do its own affirmative action. And thus you get a bigger bang for your buck because you have given an incentive to business, that does not want to spend the money it takes for compliance review, to do it because they know that a good record means: I am off the hook for *x* period of time.

This, by the way, is similar to the way we structured the systemic program of EEOC. It was based on your performance. If you, in fact, had a good showing we would not bring a systemic case against you. If you indeed were not in compliance but in the last few years you had done very well, and it was clear that you were on your way toward compliance, we would move on to the next fellow who had not done very much.

These and similar criteria seem to me to be more rational than lopping off most of the contractors.

I do want to say one word here for the record about the proposals of Representative McCloskey, because they have raised the same species of problems in their own way as those presented by the Reagan administration OFCCP regulations.

As you know Representative McCloskey wishes to rewrite the entire Executive order. The difference, of course, is that Representative McCloskey, during the years he has been in Congress, has had a civil rights record and reputation. He was strongly supportive of me while I was at EEOC and went out of his way to take an interest in the agency. He supported my management reforms and firm enforcement approach.

I have been preparing a response to his proposals, which he sent to me by mail. I have such respect for his past civil rights record that I think it important to go on record as to the approach outlined in his revised Executive order. This goes beyond anything even the administration has done. He wants to rewrite the entire Executive order.

The most serious problem with the McCloskey proposal is its assumption that the single remedy of debarment will yield effective enforcement at OFCCP, although it does serious harm in other ways such as decimating OFCCP's staff from 1,500 to 300 people. But the underlying assumption that a strong debarment policy is all there should be to OFCCP enforcement, would of course go far toward guaranteeing no enforcement.

It is the same thing as prescribing the death penalty for larceny or relying on nuclear weapons alone for defense. In such cases juries do not convict and nations do not use nuclear weapons.

The legal process and the nation state, armed only with ultimate weapons are for that reason rendered defenseless. The McCloskey proposals all stem from this fallacy. I hope that the Congressman will withdraw his proposals and involve himself in openminded discussions such as are also necessary at OFCCP so that unworkable measures in both can be corrected.

Civil rights issues are always difficult for policymakers. They are even more difficult when considerations of efficiency, cost, and paperwork must be taken into account, as surely they must. The OFCCP process is being viewed as a test of this administration's commitment to the whole of civil rights. It is foolish to rush through it with half-baked proposals equally unsatisfactory to protected groups and business.

The administration should allow the old regulations to go into effect since they largely memorialize existing practices while it deliberates and consults to improve the efficiency of the process, to reduce costs and paperwork and to preserve strong enforcement.

I want to focus my discussion of EEOC on the need to continue and strengthen systemic enforcement which you may recall was one of my chief priorities while at EEOC and one of the primary concerns of this committee. I believe that it is this emphasis that may be most endangered at the EEOC.

There is little incentive for the new administration to change Backlog Charge Processing, which had reduced the Commission's backlog by two-thirds for the first time in its history by the time I left the agency last February, or Rapid Charge Processing whose efficiencies had thus far kept new backlogs from accumulating.

Proposals to transfer the enforcement authority Congress gave EEOC back to the Justice Department and the administration's approach to systemic work as evidenced by the revised OFCCP proposals cast a shadow on the future of systemic work by the Federal Government.

The systemic program at EEOC had to be painstakingly built from the ground up. It is difficult to overestimate the importance of continuing and strengthening this work, for in this work lies an important strategy for overcoming structural employment problems minorities and women suffer in the work force.

Let me illustrate with an example: a dangerous and largely unnoticed decline in black male work force participation that I think is amenable to solution in part strong Government systemic work equal employment opportunity. Though Congress and the public are well aware of such stubborn problems as minority unemployment and teenage unemployment, there is almost no public discussion today of a dangerously abnormal and long range decline in labor force participation among black males.

Black females have had high unemployment but have shown a very healthy rise in labor force participation which exceeds that of white women, 53.5 percent to 50.6 percent. It is true that both black and white males have declining work force participation but it would appear for quite different reasons. White men are taking advantage of early retirement benefits. But judged by the ages of black men not in the labor force, no such normal phenomena account for the declining black male labor force participation.

Today 40 percent—and I want to please repeat that figure, almost half of the black males, 40 percent—of black males are not in the labor force compared with 26 percent of white males.

Mr. Hawkins. Would you repeat those statistics, Mrs. Norton?

Ms. Norton. Forty percent of black males today are not in the labor force. The figure for white males is 26 percent and almost all of the white males are accounted for by virtue of early retirement, illness or disability. But as you will see from the figures I will offer, that does not account for black male decline.

If you go back to the first figures we have on race on labor force particiation, 1948, black men actually had a higher labor force participation than white men. It was 1 percent higher in 1948, something over 87 percent as I recall it. By 1979 the positions had reversed and a wide gap had opened between black males and white males, a 6.7-percent gap between black and white male labor force participation.

The black male labor force participation decline was twice as steep between 1948 and 1979, that is to say twice as many black men fell out of the labor force in that single generation as white men. There was a 7.9 percent decline in labor force participation for white men, but there was a 15.4-percent decline in labor force participation for black men between 1948 and 1979.

What is most surprising and ominous is that this is occurring in the prime working ages between 25 and 54. Perhaps you would not be as surprised by these figures if they were teenage black unemployment figures or the unemployment figures of older black males who do not have educational and other training opportunities. But that is not the case. The decline I speak about occurs at the prime working ages between 25 and 54.

There are multiple causes of course for such a phenomenon as this, to be sure such as education, training, and a list of other problems of which we are all aware for unemployment of all kinds. But I submit that an important cause of this problem is systemic discrimination.

One gets a sense of this by looking at the concentration of black males in declining industries such as steel and auto. For example, blacks overall, men and women, have a participation rate of 9 percent in the labor force, but 15 percent of the labor force in steel and auto are black. Those figures are even more stark when you bear in mind that most of the people in auto would be black males—there are relatively few black females—and they have a participation rate in the labor force of let us say 4 or 5 percent.

So if they have 4 or 5 percent of the labor force—that is how many black males are in the labor force—and 15 percent in auto and steel, you can see that they are greatly concentrated in the wrong places. Well, how do you get people out of the wrong places? One of the most potent tools for doing that developed in the last 15 years, of course, through affirmative action.

In drawing to your attention the black male decline in labor force participation, I mean to do so not only because it is a neglected problem but I think a tragically neglected problem that may lie at the root of many other problems in the black community. I want to suggest through this example that part of its solution depends upon strong systemic work by the Federal Government and especially the EEOC.

If black males can be directed to industries which are improving in their hiring rates and out of industries which are declining, then of course these figures will improve. The only tool we have that does that in any fairly systematic way, that is encourages affirmative recruitment where you have small numbers is, of course, affirmative action. Otherwise people have to find their ways themselves, and as we all know, one of the reasons that minorities do not find their way into certain industries is because they have no pattern of being accepted in those industries.

The systemic program was the toughest program to build at the EEOC. The work is highly technical and requires constant monitoring by experts with good management skills. Because systemic work is discretionary, unlike individual cases, it is vulnerable to neglect, policy shifts and of course inadequate staff work. A strong systemic program at EEOC will require oversight from the public and this committee. You never hesitated to keep my feet to the fire when I was at EEOC. I know you will continue in that tradition.

Despite differences among administrations, there has been a rough consensus on affirmative action among the executive, the Congress and the judiciary for almost a generation now. Moreover, the remedies have had bipartisan support from Republicans and Democrats alike. Indeed, affirmative action developed into the strong remedies we know today during the Nixon and Ford years.

The remedies have been on a continuum of stronger and stronger effectiveness until today when they are considered highly effective against job bias. It would be a tragedy to allow this consensus to crumble now because of wild proposals sometimes submitted by Members of Congress.

There is much public confusion and concern about affirmative action, but there is not yet national polarization. The Congress, the President, business and protective groups should work together to increase public understanding of these vital remedies, improve their efficiency, lessen their costs and guarantee the integrity of their enforcement.

Thank you very much, Mr. Chairman.

Mr. HAWKINS. Thank you, Mrs. Norton, for a very excellent statement. You are even better now than you were when you came before the committee in your previous position.

We do not have your written testimony today.

Ms. NORTON. I apologize for that.

Mr. HAWKINS. So we could not prepare any questions in advance. However, you answered so many of them that might have been asked. I trust that we will have the benefit of your written testimony in a few days. I am assuming the reporter is as efficient as she always is. We do look forward to cooperating with you and consulting with you from time to time as we have always done.

I want to express my personal appreciation for all that you have done. Even though, as you said, we were sometimes critical, we never lost touch and we did enjoy working with you.

Ms. NORTON. Thank you, Mr. Chairman.

Mr. HAWKINS. I will allow Mr. Washington to ask some questions if he has some.

Mr. WASHINGTON. Thank you, Mr. Chairman.

I agree with you, Mr. Chairman. This is a marvelous statement and a rather stunning and shocking statement. Maybe it is good we did not have it before us. I would be in tears at some of those statistics that you gave us: 40 percent of black males are not even in the work force.

Someone said that the black males are an endangered species. I guess that is pretty true, is it not?

In the interests of time, I will just ask one or two very quick questions.

In light of your observations about the proposed rule changes by the Department of Labor, let me ask you about the Reagan transition team very briefly. I am concerned because I hear so many statements being made that are obviously erroneous: statements about the statute, about the Executive order, about court cases, about administration, about the law in general.

I am concerned that decisions might be made in a vacuum. Was there ever any dialog between the Reagan transition team and your office? Was there any communication? Did they ask any questions? Were they concerned about the track record of the EEOC? In short did they do their work?

Ms. NORTON. There was virtually no communication. We set up an office for use by Mr. Jay Parker and any of his staff. That office was virtually never used. There was virtually no interviewing of staff. Therefore, I thought the transition report was going to be a short document perhaps focusing on the papers we turned over to the team, the papers that they had requested about our operations.

The basic problem with the team and with the report was the lack of expertise of those who worked on it. These are issues that are tough and complicated. The approach of the transition team appears to have been almost totally ideological. They quoted from neoconservatives in the transition report.

When they were doing things like looking at our statistics, they were basically complimentary of the operations of the Agency. But they chose to devote a fair amount of their report to issues that they apparently did not take the time to research— issues of application of law for example that come out of court decisions and not EEOC or come straight out of the statute but not EEOC.

Thus, I was inclined to believe that the administration would find the report as embarrassing as most professionals on both sides have found it.

I have not noted that the administration has had any response whatsoever to the report, though I think the fact of such a report like that can encourage people who do not know any better to pick up some of these proposals. And I think we have already seen evidence of some of those proposals, as informed as they are, by finding snips and bits of them in pieces of legislation proposed before the Congress.

Mr. WASHINGTON. So it is fair to say if they looked at your shop it was with preconceived notions about what they wanted. They were not concerned about an empirical approach. They just had some ideas they wanted to give voice to and at best just use the Agency as sort of a launch pad to get them out.

Ms. NORTON. I think that really says it, that they did not do an investigation of any kind within the agency.

Mr. WASHINGTON. I have one other quick question. It has been bruited about the Reagan administration that perhaps State agencies should take over the antidiscrimination aspects of the Federal Government.

You know, I come from Illinois and I am certainly familiar with the Sangamon County case when the State FEPC lost jurisdiction because of laches and threw that burden on your agency. I managed to shepherd through the Illinois General Assembly a new human rights act.

But notwithstanding that, the States do not seem to have the resources and it is my opinion that if they are like Illinois, they lack the commitment to do a real enforcement job and they do not have the expertise to do it. And even if they wanted to, in order to shape it, it would take some time.

How would you respond to this approach to decentralize enforcement of this national problem?

Ms. NORTON. It is an unbelievable proposal coming after the great fight that produced the 1964 Civil Rights Act. That is what we had before the 1964 act. We had only State enforcement. What produced, of course, the great call for the act was the inadequacy of State and local enforcement to meet patterns that are nationwide. So we got the 1964 Civil Rights Act.

The notion that anyone would dare suggest that we ought to go back to pre-1964, I think, is a comment on these times. I cannot believe that we would let that happen.

I agree with you that the State agencies are very uneven and have often been quite inadequate, often poorly funded, sometimes political in a way that Federal agencies often are not. In order to improve their operations, we required them to meet performance standards for processing cases before they could get EEOC funding.

But it ought also be said that the State agencies were very responsive to that and that many of their operations have improved. But I think they would be the first to say that they could not begin to handle the entire national load by themselves, that they suffered for a long time because EEOC was so overtaxed with its own backlog it could not give them the help and attention they needed.

So if anyone were to put upon them the whole load, I think they would collapse of their own weight. I think they would be among the strongest proponents for maintaining the Federal presence in this important area of the law.

Mr. WASHINGTON. I want to commend the Chairman and staff for launching a hearing on what is obviously and clearly one of the most important issues of the day. If subsequent witnesses are of the high caliber as this last witness, we are going to get some testimony that would stun Mr. Reagan and Mr. Stockman and Mr. Hatch and all of the other Hatches and Reagans and Stockmans.

Thank you, Mr. Chairman.

Mr. **Hawkins**. I am not so sure all of the other witnesses will be quite as good, but we will try.

May I ask you two quick questions, Mrs. Norton?

Much of the Reagan administration's reasoning in opposition to the EEO regulations on reporting compliance processes is that they are needlessly burdensome, particularly for small- and medium-size businesses. How much of this criticism is valid?

Ms. **Norton**. Some of that criticism is valid. It is true that the regulations have grown up and the practices, I should say, have grown up over 10 years. But there are two ways to approach regulatory reform. You can take the heart out of regulation or you can take the problems out of regulation.

These people appear to be approaching regulatory reform as if there should not be regulations in the first place. That is the objection I have. I do not think that we, who are advocates of public policy involvement in areas like civil rights and the environment, ought to take the position that there are no improvements to be made in the enforcement of these regulations. But I think we ought to yell to high heavens when the approach crucifies the mandate that the regulations are trying to carry out.

In point of fact, OFCCP went quite far during the last administration in streamlining its own process. The only reason they did not get any further is, of course, that it was a mammoth job, which I think they did very well under the circumstances, of taking on new compliance units from all over the Government. OFCCP had to assimilate those and rewrite regulations. It is pretty hard to do that and streamline your operation at the same time. It was much easier for me to streamline at EEOC because I had a stable agency in place.

If the OFCCP had been allowed under that leadership to go further, I am certain that within the next couple of years it would have gone even further in streamlining and improving its processes. I think it would have done so in a way so as not to undermine and undercut enforcement as the changes now being proposed do.

In other words, they appear to approach it as if they believe it is either enforcement or efficiency. I believe that there are ample precedents to show that there need not be an either/or. It is much more difficult to go about it in this way because one has to be much more thoughtful, much more careful, much more involved in the technicalities of the work if one wants to make sure that enforcement stays in place and yet provide efficiency, get rid of paperwork, reduce costs.

I do not suggest that that is easy. But I do suggest that to do it without due regard to whether or not you have left in place enforcement with any integrity is to undermine the whole purpose of an agency or in some cases of a mandate of Congress.

Mr. **Hawkins**. How do you think this committee could proceed to do that in spite of the lack of cooperation of the Reagan administration? This is one of the things we had wanted to discuss with them, ways in which we could help to streamline some of the processes.

Ms. **Norton**. As I understand it, you invited to this hearing members of the staff of OFCCP involved such as the director, and the director of OFCCP declined to come before this committee?

Mr. **Hawkins**. Yes; that is correct. We extended invitations to OFCCP officials as well as to the Secretary of Labor and such other witnesses as he would suggest. I believe we specified Solicitor Ryan and Ellen Shong. It was unlimited. We were perfectly satisfied with anyone that he would suggest. The same invitation was extended to the Attorney General in his case.

So we have no reluctance to include any and everyone possible to help out because obviously we agree with the statement you just made. We believe that there is some cause for certain business persons not to cooperate merely because of the manner in which the regulations are sometimes drafted.

What authorities do we have that we could call on to help in that process? Obviously we will be in the field hearings listening to many of the probusiness persons as well as business persons themselves. I was wondering, however, from the viewpoint those who have had such experience, as you have, in drafting the regulations, where do we look to get that type of testimony?

Ms. **Norton**. It is difficult to believe that if the director of OFCCP is called before this committee perhaps by herself that she would not come.

Mr. **Hawkins**. They may have the same problem that we have, I guess, at the beginning of every new administration. Everybody says, "give us time."

Ms. **Norton**. I asked to come before this committee.

Mr. **Hawkins**. You came up eventually. But we do not anticipate that anyone will come forth to do that in the present situation if they are against regulations to begin with.

Ms. **Norton**. If I might be so bold as to suggest that, at the very least, I should think that a private meeting between either the Secretary and/or the Director with Members of Congress should be possible so that there can be at least an exchange of views on such weighty matters as the entire regulatory process, since these regulations involve that. And I should think, at the very least, a meeting either here or in the office of the Secretary would be in order.

I do think it most important that congressional oversight not be thwarted in this area. As I said, I cannot believe that this will be the pattern. I just cannot believe that an agency would go for 4 years with the Congress without responding to Congress' right to know what is happening in agencies.

Mr. **Hawkins**. We intend to give them time. We are reluctant to use the subpena power.

Ms. **Norton**. I understand that, but of course you do have that weapon.

Mr. **Hawkins**. We do have that weapon, but I am reluctant to use it.

Again we wish to thank you.

This concludes the hearing here in Washington, at this time. Further hearings in Washington will take place as scheduled for the month of September. In the meantime, during the month of August, there will be field hearings.

Thank you again, Mrs. Norton.

Ms. NORTON. Thank you very much, Mr. Chairman.

Mr. HAWKINS. This concludes today's hearing.

[Thereupon, at 2:10 p.m., the subcommittee adjourned subject to the call of the Chair.]

[Material submitted for inclusion in the record follows:]

COUNCIL ON THE ECONOMIC STATUS OF WOMEN,
Saint Paul, Minn., June 29, 1981.

Hon. AUGUSTUS HAWKINS,
U.S. Representative,
Rayburn Building, Washington, D.C.

DEAR REPRESENTATIVE HAWKINS: The following is submitted as testimony for your hearings on proposals to eliminate or qualify affirmative action laws.

Our Council is a legislative study commission which studies and makes recommendations on all matters related to the economic status of Minnesota women. We have published a number of reports on various subjects, and listed below are some of our findings.

In a study of state government employment, we found that: The salary gap between the average female employee and the average male employee has increased from $4,190 in 1976 to $5,013 in 1980; The average salary for a woman after 20 years of state service was the same as the average beginning salary for a male employee (1976); However, gains have been made: the proportion of managers who are women increased from 4.0 percent in 1976 to 11.3 percent in 1980, and the proportion of laborers who are women increased from 3.6 percent to 17.2 percent in the same period.

In a study of city and county employment, we found that: Men outnumber women by more than six to one in fire protection, police protection, corrections, streets and highways, utilities and transportation (1979); Substantially more than half of male city/county employees earn $16,000 or more yearly, a salary level reached by only 16 percent of the women (1979); However, from 1977 to 1978, there was a slight improvement in the representation of women among local government administrators, skilled craft workers, and service/maintenance workers.

In a 1979 survey of female apprentices in the skilled trades, we found: More than half of female apprentices said they wanted more information about affirmative action laws; The proportion of apprentices who are women in Minnesota increased from 0.9 percent in 1978 to 1.2 percent in 1979; Almost half of the women responding said they had experienced harassment or discrimination on the job. However, a number said that they were accepted in their programs because "the union said the next apprentice was going to be a woman" or "the newspaper was talking up women in the trades."

We believe these findings indicate support for existing commitments to affirmative action. Although information about the laws needs to be made more widely available, and although enforcement efforts need to continue, affirmative action has contributed to improvements in the economic status of women in our state.

We urge your support for a continued commitment to affirmative action.

Sincerely,

NINA ROTHCHILD,
Executive Director.

STATEMENT BY RUTH J. HINERFELD OF THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES

The League of Women Voters of the United States is a nonpartisan volunteer citizen education and political action organization made up of 1400 state and local Leagues in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. From its inception in 1920 the League of Women Voters of the United States has worked for equal rights for all and the League has a long-standing commitment to affirmative action.

The League has pursued this commitment through multifaceted efforts. One of its founding principles was equal opportunity for women in government and industry. The League's current emphasis on civil rights in employment stems from its 1964 convention decision to direct its energies to promoting equality of opportunity, including equal access to employment for minorities and women.

In 1976, the League of Women Voters Education Fund's Litigation Department filed suit on behalf of a number of organizations and women seeking construction jobs to compel the Department of Labor to require affirmative action including goals and timetables for the employment of women by federal construction contractors. The suit resulted in the promulgation in 1978 of revised Department of Labor regulations establishing specific affirmative steps that federal contractors must take to show good faith efforts to achieve participation goals for women in the construction industry. The following year the League petitioned the Department of Labor requesting that it amend its regulations to require specific affirmative action for women, including goals and timetables, in all federally registered apprenticeship programs. In 1980, the Litigation Department petitioned the Department of Labor to issue regulations prohibiting the use of maximum age limits as entrance requirements in registered apprenticeship programs, because such limits virtually foreclose participation by women choosing non-traditional careers, who generally make such vocational decisions later than men do.

The League joined in an amicus brief in Kaiser Aluminum v. Weber in support of the legality of affirmative action programs established voluntarily by employers who have not in the past been found to discriminate.

The League has consistently supported strong enforcement of anti-discrimination laws, regularly commenting on regulations proposed by the Equal Employment Opportunity Commission, the Department of Labor's Office of Federal Contract Compliance Programs and other federal agencies concerned with employment discrimination. League effort directed to the executive branch involved the reorganization of federal equal employment activities. The League reviewed, made recommendations, and supported the reorganization proposals and the resultant centralization of federal equal employment enforcement within the Equal Employment Opportunity Commission (EEOC).

On the legislative side, the League has consistently opposed congressional anti-affirmative action amendments. In April 1981, the League joined in testimony presented by Eleanor Holmes Norton, past Chair of the EEOC before the Senate Committee on Labor and Human Resources that supported a strong federal commitment to affirmative action.

The League has been working actively with an informal coalition of women's and civil rights organizations to express our total opposition to proposed changes in either Executive Order 11246 or its implementing regulations that would have the effect of reducing federal enforcement of equal employment. Within the past two months, we have written to the Secretary of Labor and to David Stockman, Director of the Office of Management and Budget, expressing these views.

Before commenting on the equal employment opportunity policies that appear to be emerging from the present Administration and this Congress, we must first point out that our statement must be rather general, due to the lack of precise information that has been made available to affected groups as to what these proposals actually include. The League has always commented on initiatives by past administrations to revise or reform legislation and regulations. Presently, however, it is difficult for us to engage in a meaningful discussion of possible changes due to the virtual closed door atmosphere in which revisions in affirmative action programs are being contemplated. Our response to the proposed changes in equal employment law is guided only by informal statements of cabinet officials and their preliminary actions regarding enforcement. No written draft of proposed regulations has been provided for us to consider, and the administration's consultation with representatives of civil rights organizations has been extremely limited.

We had hoped that the Administration would take the opportunity to enlighten us on its proposals at these hearings sponsored by the House Subcommittee on Employment Opportunities. Those invited to testify, including representatives from the Department of Labor, the Department of Justice, and the Office of Management and Budget, declined, with the suggestion that the subcommittee should await the Administration's final actions before commenting. If this suggestion is taken, it will set a dangerous precedent regarding future input from those groups who will be most affected by changes in laws submitted by new administrations. It is the League's long-held belief that citizens must participate in making, and not merely be the recipients of policy in a democracy. The current procedure suggests that haste and lack of input accompany this Administration's policy-making procedures, and we do not feel that citizens will be well served by these practices. We hope that in the future, closed door policies will not be the norm in this Administration's policy initiatives.

Sex and race discrimination continue to be a serious deterrent to women and minorities seeking employment -- even after the enactment of major affirmative action programs over the last two decades. For example, although fifty-one per cent of all women aged 16 and over are now in the work force, they represent a disproportionate share of the working poor. Women continue to be paid substantially less than men. Overall, women earn only 59¢ for every dollar earned by a man.[1] In 1979, full time women workers who were high school graduates earned less on the average than fully employed male workers who had not completed elementary school. Women workers who had graduated from college earned less than male workers with an 8th grade education.[2]

The primary reason for this wage differential is that most women work in a limited number of sex-segregated jobs that tend to be low paying. As stated in the League's amicus brief in United Steelworkers v. Weber 443 U.S. 193 (1979):

> Over 25% of women workers are concentrated in occupations that were 90% or more female. The list of jobs in which women constitute the vast majority of workers is a litany of low paid, low status jobs in our society:

Secretaries	99.1% female
Prekindergarten & School Teachers	98.7%
Housekeepers	97.2%
Telephone Operators	95.3%
Sewers & Stitchers	95.2%
Keypunch Operators	93.2%
Waitresses	90.4%
Bookkeepers	90. %
Cashiers	87. %

> At the same time, women's underrepresentation in the professions and highly skilled, highly paid blue collar

> jobs is as dramatic as their saturation in low-paid, low-status jobs.[3]

In private industry, women are substantially underrepresented in managerial roles. In 1978, men were 83% of all officials and managers; women were 82% of all office and clerical workers. Men were 65.7% of all professionals in private industry; women were 8.6% of all craft workers.[4] This occupational segregation, combined with an unemployment rate 1.32% times that of men [5] shows that employment opportunities for women are still far less than those of men.

For blacks and other minorities, employment opportunities are substantially fewer than even those of white females. In 1978, the unemployment rate for blacks was 2.4 times that of whites, the widest gap between the two groups since the federal government began recording employment statistics by race.[6] In 1980, black teenage unemployment was more than twice that of white teenagers (36% unemployment for black youths - 16% for white youths).[7] The National Urban League's study of poverty rates for blacks states the following:

> As a result of the disproportionate impact of two recessions and record-level inflation on blacks during the 70's, the number of poor blacks rose sharply over the decade, while the number of poor whites declined. For example, while the number of poor white families fell by 2% (from 3.6 to 3.5 million) between 1969 and 1979, the number of poor black families soared by 22% (from 1.4 to 1.7 million).

> Similarly, while the number of poor white individuals remained relatively unchanged (at 16.7 million) over that ten year period, the number of poor black individuals jumped by 11% (from 7.1 to 7.8 million).
> This disproporticnate increase in poverty among blacks led predictably to a widening of the income gap between blacks and whites. In 1970, blacks had 61% of the income of white families, but by the end of the decade blacks had only 57% of the income of white families.[8]

The study continues to show that the median income among black families in 1979 rose by $5,330 from 1970 (from $6,279 to $11,609) while the median income of white families rose by $10,209 (from $10,236 to $20,438). Thus, the median income of the average white family is nearly double that of a black family.[9]

Job segregation is an additional, continuing barrier to minorities as well as women in the workforce. In private industry, minorities are severly under-represented in higher status, higher-paying jobs. For example, a 1978 EEOC report on minorites and women in private industry showed that of all officials and managers in private industry, 78.0% are white males. Only 6.8% are minorities. 60.8% of all professionals in private industry are white males, 9.2% are minorities. The only job categories where the minorities are more highly represented than white males are office and clerical workers (14.7% white males - 16.5% minorities) and service workers (30.0% white males - 31.5% minorities). The evidence shows that minorities continue to work at low paying jobs resulting in a substantially lower income level than that of white males.[10]

Still, the picture is not as grim as it once was. As women and minorities have entered the work force, they have demanded and have obtained training and employment opportunities that were once considered to be off-limits to them. We submit that the progress that has been made in increasing the participation of women and minorities in the work force is largely due to strong enforcement of anti-discrimination laws and affirmative action programs. Without affirmative action, this participation would decrease drastically and progress towards equal employment opportunity could quickly become a thing of the past.

Current philosophical attacks on affirmative action and administrative proposals that threaten enforcement of anti-discrimination laws make the end of affirmative action a real possibility. Charges that affirmative action is reverse discrimination, or that goals and timetables utilized to measure the success of affirmative action are in reality quotas, fuel the opposition to the continuing enforcement of equal employment laws. In addition, critics of affirmative action maintain that affirmative action places too great a financial and accounting burden on the business sector to repent for society's past transgressions, and that affirmative action objectives established by the federal government are not achievable in light of today's economy.

We believe that these arguments are grounded in serious misconceptions. First, complaints about the drawbacks -- real and imagined -- of particular affirmative action techniques, are treated as if they discredit the entire concept of affirmative action. Affirmative action is not synonymous with goals and timetables, although one would think so from newspaper coverage of this issue. What is really at stake here is any collection of concrete steps, particularly those that take into account race or sex, used to remedy the lack of employment opportunity for women or minorities.

Second, critics assailing "affirmative action" often fail to acknowledge that there are different kinds of affirmative action programs, with different legal bases. The most familiar is the court-ordered program, one of the remedies typically awarded in discrimination cases as a means of removing the effects of the challenged discrimination. The authority of the courts to include affirmative action as a remedy has been upheld so often it should no longer be open to discussion.

Affirmative action programs are often included in the conciliation agreements negotiated in settlement of discrimination claims pursued through the EEOC. Again, the purpose is obvious -- to remove the effects of the discrimination that prompted the claim.

An affirmative action program can also be voluntary, adopted by an employer who wants to address an obvious imbalance in the workforce. Now that the Supreme Court has upheld the validity of voluntary affirmative action efforts with its decision in Kaiser v. Weber, hopefully private industry will increase its use of such programs.

Affirmative action programs are also required of recipients of federal funds by a number of federal statutes and by Executive Order 11246, as a means of implementing our national policy of equal employment opportunity. These laws and the Executive Order have withstood numerous court challenges. Most recently, the minority set-aside program for government contractors was upheld by the Supreme Court, in Fullilove v. Klutznick.

These affirmative action requirements are also remedies, designed to remove the barriers to equal employment opportunity for those traditionally excluded. If we are as a nation committed to equal employment opportunity, then federal money must be dispensed in a manner that furthers that goal.

The argument that goals are the same as "quotas" is often used by critics of affirmative action. Supporters of affirmative action contend otherwise. In the business world generally, goals represent a fundamentally sound management tool, without which no business would be able to measure its success. With respect to affirmative action, goals represent flexible targets or measures of success in implementing legally recognized anti-discrimination laws. Quotas, on the other hand, reflect rigid requirements of selection with little or no emphasis on merit. In fact, under the Executive Order, good faith effort by the employer is the real test of implementation; goals need not be inflexible. Affirmative action programs are not quota programs. However, affirmative action without numerical goals to measure success in placing minorities and women would be an essentially useless tool in the fight against discrimination. The League strongly opposes any change in legislation or regulations that would forbid the use of goals or timetables in implementing affirmative action programs.

Other criticisms of affirmative action include charges that it is cost-prohibitive, and that is imposes too great a burden on American business. We disagree that the cost of affirmative action is too high. In a recent study by Working Woman, an organization of 12,000 office workers, a cost-benefit analysis was used to determine the cost of affirmative action per employee.[11] The study was based on data gathered by the Business Roundtable. The average cost of an affirmative action program for a bank is 0.01 per cent of gross revenues, or $12.50 per employee. Three major banks that were studied spent an average of $356,000 on affirmative action in 1977. In that same year, they grossed $9.9 billion in revenues. In terms of the benefits reaped by society as a whole as compared with the small costs incurred as a result of affirmative action, we do not believe that the burden suffered by American business is too great to bear.

Other critics maintain that affirmative action objectives are not achievable in today's business climate. However, in a study entitled "Employer Attitudes Towards Affirmative Action," commissioned by Barnhill-Hayes, Inc.,[12] a substantial number (47%) of corporate executives surveyed believe that the objectives of affirmative action as established by the federal government are achievable within the framework of their current business practices. Twenty-five per cent of those surveyed said that they do not believe these objectives are achievable; but, over a third of these respondents believed that the reason is a lack of qualified candidates. Nearly half of the business community surveyed believes that business has not been asked to assume too great a responsibility with regard to eliminating discrimination in society. In terms of how corporate executives feel about the effects of affirmative action on their business activities, by a 5-1 margin (72-15%), executives surveyed contended that their companies' employee productivity had not been diminished by affirmative action.[13] Finally, the majority of corporate executives surveyed said that affirmative action is not declining as an issue for top management, and that it has been an effective tool in advancing the cause of women and minorities in employment in the private sector.[14] Affirmative action seems to have become a fact of life in the corporate world, and is generally viewed as an acceptable management tool.

Another argument frequently raised by the opponents of affirmative action is that is hasn't worked. The League, however, does not share this view. We maintain that without affirmative action, women and minorities would continue to face insurmountable barriers to employment opportunities. Since the Equal Pay Act of 1963, the Civil Rights Act of 1964 and Executive Order 11246, tremendous strides have been made by women and minorities. From a historical perspective, blacks in white collar occupations accounted for only 6% of all black employment in 1940, and by 1960, the proportion doubled to 13%. The proportion of black workers in white collar occupations continued to increase in the 1960's and reached 24% in 1970.[15] Urban League studies show that between 1975 and 1980, the number of employed blacks increased by 17%, the biggest gains in higher status occupations,[16] and that according to a 1980 poll in Black Enterprise magazine, affirmative action has been the greatest single contributing factor to this upsurge.

Dramatic strides in the employment of women in nontraditional careers have also been a result of affirmative action. In testimony before the Senate Labor and Human Resources Committee earlier this year, Betty Jean Hall of the Coal Employment

Project, an organization that works with women miners, spoke of the progress they have experienced in breaking the barriers of sex discrimination in the coal industry:

> It probably won't surprise you to learn that, according to federal statistics, there was no such thing as a woman coal miner in this country until late 1973. By December 31, 1980, 3,295 women had begun underground coal mining careers.
>
> To paint the picture clearer:
> In 1973, 1/1000 of 1% of all underground miners hired were women;
> In 1974, 1/100 of 1% of all underground miners hired were women;
> In 1975, 1% of all underground coal miners hired were women;
> In 1976, 2% of all underground coal miners hired were women;
> In 1977, 3.4% of all underground coal miners hired were women;
> In 1978, 4.2% of all underground coal miners hired were women;
> In 1979, 11.4% of all underground coal miners hired were women; and
> In 1980, 8.7% of all underground coal miners hired were women.
>
> These dramatic strides were made possible, we repeat, only because of the combination of lots of determined women who wanted those jobs, and the support fo the Office of Federal Contract Compliance Programs, who responded to our plea for help. (Testimony before the Senate Labor and Human Resources Committee, April 21, 1981)

This and numerous other examples of the strides women and minorities have made as a result of affirmative action make it clear to us that these programs, combined with strong enforcement of anti-discrimination laws have been effective, and should not be weakened or eliminated. We believe that affirmative action will continue to be necessary as a remedy to eradicate the effects of past discrimination as long as discrimination persists as a problem in our society.

We are extremely concerned about the proposals pending in Congress and the general posture of the administration in regard to its continuation and enforcement of anti-discrimination laws. The variety of attacks against strong equal employment opportunity laws include the following: 1) Senator Orrin G. Hatch's proposed constitutional amendment, S.J. 41, which would bar the enactment of laws that use race conscious measures; 2) Senator Don Nickles' proposed amendment to Title VII, which would prohibit the voluntary affirmative action program upheld in the Weber case; 3) Representative Robert Walker's proposal, HR 3466, which would amend the Civil Rights Act of 1964, prohibiting the use of goals and timetables as an enforcement mechanism by government agencies; 4) Representative Paul McCloskey's proposed revision of Executive Order 11246, which would eliminate reporting requirements for federal contractors and reduce sanctions that could be administered for non-compliance; and 5) the Department of Labor's proposed changes in OFCCP regulations that would substantially reduce the coverage of Executive Order 11246.

We believe that the enactment of any of the above proposals would effectively eliminate enforcement of anti-discrimination laws and would certainly undermine affirmative action efforts in any form.

The League opposes the concept of any constitutional amendment similar to that proposed by Senator Hatch that would prohibit affirmative action programs. Senator Hatch believes that the Constitution should be color-blind. We believe that it is, but that people are not, and until sex and race discrimination are eliminated in this country, affirmative action will be necessary to assist those persons whose merits are not recognized in the absence of such measures.

The League is also gravely concerned about proposed amendments to Title VII being put forth by Senator Don Nickles. Such changes would irreparably damage both the ability and the flexibility of the EEOC to resolve complaints. Among the limitations proposed by Nickles are: limiting the scope of investigations by EEOC; mandating conciliation as a prerequisite to filing suit; eliminating EEOC's systemic complaint program; and limiting both the legal forum and the legal remedies available to those who file complaints. Any of these changes, or others that would go even further, would virtually eliminate effective enforcement from the federal agency with primary responsibility for enforcing equal employment opportunity. The League is adamantly opposed to any such changes.

The League is equally opposed to proposals repeatedly put forth by Congressman Walker that would prohibit federal agencies from requiring the use of goals and timetables. As indicated elsewhere in this statement, goals and timetables represent sound business practice utilized as indices of success. There is no sound basis for eliminating such a use for one aspect of business -- eg. personnel matters. The elimination of goals and timetables as a remedy would render enforcement agencies totally ineffective in combatting race and sex discrimination. Goals are the most effective means available of measuring the success of affirmative action programs. To eliminate them would create a world of uncertainty for businesses trying to measure their success in hiring women and minorities.

The revisions to Executive Order 11246 proposed by Congressman McCloskey would eliminate almost all reporting requirements for federal contractors and retain only the sanction of debarment for noncompliance. Such proposals would cause irreperable harm to the OFCC program. Fewer reporting requirements would make agency enforcement extremely difficult, if not impossible. Further, the elimination of back pay as a remedy means that victims of past discrimination would go uncompensated. This flies in the face of one of the firmly held tenets of our judicial system -- that injured parties are entitled to be made whole. Debarment does nothing to compensate those who were unjustly denied jobs or denied promotions.

We would like to comment briefly on what we know of the Department of Labor's proposals to revise the OFCCP regulations. DOL has proposed raising the ceiling on contractors required to submit AAPs from current levels of 50 or more employees and a contract of $50,000 or more to 250 employees and a contract of $1,000,000. As was said in a position paper sent to DOL on behalf of a number of women's groups:

> We are opposed to any reduction in the number of contractors subject to the requirement of submitting affirmative action plans (AAPs). This requirement provides one of the most important tools for ensuring equal employment opportunity in the entire arsenal of enforcement mechanisms. Only when

> employers undertake self-analysis of their work forces and develop steps to correct underutilization will significant progress be made toward full-scale integration of women and minorities into the jobs from which they have been historically barred. The purpose of the federal contract compliance program is to achieve that progress by requiring such self-analysis and affirmative action planning of all companies that have any significant contracts with the federal government. The right of the government to impose this requirement as a condition of doing business with it has been upheld by virtually every court that has been faced with the issue.

Another change being considered by the Department of Labor would change the reporting requirements, eliminating annual AAP summaries in lieu of five year plans. While the requirement of an annual submission alone will not guarantee review of affirmative action programs, it does mean that contractors will perform a regular assessment of their affirmative action performance, thus serving as an additional incentive to comply with affirmative action standards. The League is opposed to any reporting changes of this nature.

Third, DOL has indicated that it is considering eliminating preaward reviews. The Government has an obligation under both the Constitution and Executive Order 11246 not to grant contracts to employers that discriminate. Some effort must be made to ensure that prospective employers are in compliance with the law, if the government is serious in its efforts to achieve equal employment opportunities. The preaward review is the only tool available to accomplish this.

Finally, DOL has indicated that it is uncertain as to whether back pay should be retained as a remedy for past discrimination on the part of an employer. The fact that the Administration is even considering rescinding such a requirement is a clear signal of the Administration's intent to retreat from effective enforcement. This incentive has proved to be of unparalleled effectiveness in carrying out the intent of the Executive Order. It is well recognized by the labor relations community that there cannot be effective law enforcement without having some "make whole" provision to remedy discrimination.

In sum, while the League would like to work with Congress and the Administration to improve enforcement of equal employment opportunity laws and the functioning of the OFCCP, we firmly believe that none of the proposals discussed above would do so. Instead, all of the proposals would drastically curtail government oversight and enforcement in this area, and effectively eliminate any incentives for employers to carry out voluntary affirmative action programs. The fight to eradicate sex and race discrimination in employment in this country is not yet over. If the federal government reduces its arsenal of weapons available to win the war, it will mark a significant retreat. Women and minorities will once again be left behind, unable to reach even the first rung on the employment ladder.

We thank you for the opportunity to submit our views.

FOOTNOTES

[1] U.S. Department of Labor, Women's Bureau

[2] Ibid.

[3] Brief amici curiae at 23, *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979).

[4] Equal Employment Opportunity Commission, "1978 Report: Minorities and Women in Private Industry," Volume I, February, 1980.

[5] Brief Amici Curiae at 25, *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979).

[6] Census Bureau, U.S. Department of Commerce, P-23 Series, No. 80, "The Social and Economic Status of the Black Population in the United States: An Historical View, 1790-1978." (1978).

[7] "The Economic Status of Black Americans," *The State of Black America 1981*, National Urban League, New York, January, 1981.

[8] Ibid. pp. 31-32.

[9] Ibid. p. 33.

[10] Equal Employment Opportunity Commission, "1978 Report: Women and Minorities in Private Industry," Volume 1, February 1980.

[11] Working Women, A National Association of Office Workers, "In Defense of Affirmative Action. Taking the Profits Out of Discrimination," June 18, 1981.

[12] Barnhill-Hayes, *Employer Attitudes Toward Affirmative Action*, Milwaukee, Wisconsin, April, 1979.

[13] Ibid. q. 8, p. 21.

[14] Ibid. q. 18, p. 39.

[15] "The Economic Status of Black Americans," - Table 4, *The State of Black America 1981*, National Urban League, New York, January, 1981.

[16] Ibid.

OVERSIGHT HEARINGS ON EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION

Part 1

WEDNESDAY, SEPTEMBER 23, 1981

House of Representatives,
Subcommittee on Employment Opportunities,
Committee on Education and Labor,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:20 a.m., in room 2261, Rayburn House Office Building, Hon. Augustus F. Hawkins (chairman of the subcommittee) presiding.

Members present: Representatives Hawkins, Clay, Washington, Petri, Fenwick, and DeNardis.

Staff present: Susan Grayson, staff director; Edmund D. Cooke, Jr., legislative associate; Carole Schanzer, legislative associate; Terri P. Schroeder, staff assistant; Edith Baum, minority counsel for labor; and Steve Furgeson, legal intern for graduate studies in labor law.

Mr. **Hawkins**. The Subcommittee on Employment Opportunities of the Committee on Education and Labor is called to order. This is the fourth hearing, in a series that the subcommittee has conducted in excercising its oversight of the Federal Government's enforcement of equal employment opportunity laws.

Since our initial hearing we have attempted to insure that the administration had an opportuinity to discuss its developing EEO policies with this subcommittee. The Office of Management and Budget, the Department of Justice, and the Department of Labor have each been invited to testify during this series of hearings, first at the hearing held on July 15, 1981, and most recently at the present hearings. While we viewed their earlier refusals to appear with some concern, we are pleased that the Department of Justice and the Department of Labor have agreed to testify. We look forward to hearing this morning from Mr. William Bradford Reynolds, Assistant Attorney General for the Civil Rights Division, Department of Justice. In order to allow the Undersecretary of Labor designate Malcolm Lovell to testify for the Department of Labor, his testimony has been rescheduled for October 7, 1981. We look forward to hearing from the DOL representatives at that time.

Throughout these hearings, we have focused on the emerging equal employment opportunity policies of the Reagan administration as disclosed both by statements of principal Cabinet officials and by actions of those officials regarding matters relating to the enforcement of equal opportunity laws.

As a result of recent disclosures and publications, we now know that the Justice Department will no longer require goals and timetables as remedies for employment discrimination. We do not know what alternative remedies it will employ to insure the eradication of present discrimination as well as elimination of the effects of past discrimination.

The first witness before the committee this morning is Mr. William Bradford Reynolds, Assistant Attorney General for Civil Rights Division.

Mr. Reynolds, I was purposely delaying the hearing slightly because several members are on the way. I appreciate the fact that your time is limited, and so is the committee's, and for that reason we will proceed. Other members will be joining the committee this morning.

We appreciate your testifying before the committee. Unfortunately, however, we did not receive the prepared statement until this morning. It is a rule of the committee to have the statements before the committee at least 24 hours in advance, but we well recognize that all of us are busy these days.

I have not yet had an opportunity to read the statement, so I hope that you will spend as much time as possible on actually presenting the statement and not feel constrained to economize on time in giving only the highlights, because the Chair—and I am sure the members of the committee—have not had an opportunity to analyze the statement.

Perhaps, before the morning is through, we will have an opportunity to be a little better acquainted with your views, as well as your becoming better acquainted with the views of the members of the committee.

Again, may I express appreciation for your appearing before the committee. We look forward to your testimony.

STATEMENT OF WILLIAM BRADFORD REYNOLDS, ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS, U.S. DEPARTMENT OF JUSTICE

Mr. Reynolds. Thank you, Mr. Chairman. I apologize for the fact that this did not get to you until this morning. I think in light of the fact that it was a late delivery, it would be useful for me to give to you the full statement. That would also have a benefit for those people who are on their way being able to pick up with the text of it while I am giving the statement and follow on.

If that is agreeable with the Chair, I think I would prefer to do that.

Mr. Hawkins. That is quite satisfactory. Thank you.

Mr. Reynolds. Mr. Chairman, I am pleased to be afforded this opportunity to discuss with you my views and the views of this administration on the important issues relating to how inequities that occur in the area of employment should be addressed and corrected. I also welcome the opportunity to hear the questions and views of you, Mr. Chairman, and other members of the subcommittee.

This appearance is my first before a legislative body since I assumed office on July 27 of this year. It is fitting, it seems to me, that my initial appearance concerns the subject of equal employment opportunity, since the field of employment is one of the most important in the area of civil rights.

If a person is denied employment because of race, national origin or sex, the consequences may well be so serious as to make other civil rights largely academic. For example, access to equality of housing opportunity has little practical significance if an individual is discriminated against in the job market and cannot earn a wage to purchase decent housing.

Similarly, a diploma becomes less valuable if it fails to open doors to positions for which the person was trained.

So, the issue we are addressing today—equal employment opportunity—is of paramount importance. I know that this subcommittee, and particularly you, Mr. Chairman, fully appreciate the significance of equal employment opportunity and have done extensive and significant work in this area.

Before turning to the specific subject of my remarks today, let me provide a framework by first outlining for you what I see as my job and my role.

As the Assistant Attorney General for Civil Rights, I am a law enforcement official, sworn to uphold the Constitution and the laws of the United States. The role of the Civil Rights Division of the Department of Justice is to enforce in the courts all Federal civil rights laws which come within the Attorney General's enforcement responsibilities by act of Congress, and to perform such other duties in the field of civil rights as the Congress, the President and the Attorney General may assign.

The general areas receiving attention by the Division include housing, education, coordination of grant-related civil rights requirements, public services, institutions, and other public facilities, criminal civil rights violations and, of course, employment. Of course, under title VII, EEOC brings suits against private employers.

My testimony today has two principal themes.

First, I want to underscore the fact that this administration intends to pursue a vigorous policy of full and effective enforcement of the equal employment opportunity laws. On this point it is worth taking a few moments to describe what the Civil Rights Division has been doing recently in this particular area.

Second, I want to explain and discuss with you our policy with regard to corrective or affirmative action to overcome the effect of past discriminatory practices.

As to the record of the Civil Rights Division in 1981 in the field of equal employment opportunity, both the President and the Attorney General have spoken repeatedly on this administration's intent and determination to enforce vigorously the laws prohibiting discrimination, and particularly laws prohibiting discriminatory employment practices. I share that intent and that determination.

Let me give some specifics to show what the Civil Rights Division has been doing to enforce the laws.

I have been in office for less than 2 months, so much of what I describe here took place before my assumption of authority.

One, the Division has filed several new-pattern-and-practice suits alleging discriminatory practices based upon race, national origin, and sex discrimination. Although I have been in office for but a short time, I have authorized full pattern and practice investigations into the employment practices of more than a dozen public employers. Just last week we filed a complaint and obtained a consent decree in a suit alleging sexually discriminatory practices in the New Hampshire State Police force.

Two, in contested litigation, the Division had a successful trial in February in a suit against the North Carolina State Police Department on the limited issue of the discriminatory use of minimum height requirement, with the judge ruling favorably from the bench. In *United States* v. *County of Fairfax,* a trial in March resulted in a ruling of discriminatory practices against blacks and women by the county in the job categories involving the largest numbers of county employees. We are now in the elaborate and difficult stage II of litigation, where individual claimants may be shown to be victims of past discriminatory practices and thus may establish their entitlement to back pay and priority in offers of employment and promotion.

In August, we tried a suit alleging that certain employment practices utilized by the Texas Department of Highways and Public Transportation—one of the largest agencies of the State of Texas—discriminated against blacks, hispanics and women.

Three, the Department has filed important amicus briefs with the Supreme Court in a number of cases, including *Gunther* v. *State of Washington,* involving the construction of title VII as it concerns sexually discriminatory pay practices.

Given the inevitable delays of a transition, I suggest that this record is one of accomplishment. I believe it is evidence of this administration's commitment to vigorous enforcement of Federal equal employment opportunity laws.

Let me now direct my attention to the new Justice Department approach in fashioning appropriate relief to correct the effects of past discrimination.

The focus of today's hearings is on affirmative action and enforcement of equal employment opportunity laws. It should be noted at the outset that the phrase "affirmative action" means different things to different people, ranging from simple diligence in insuring against discrimination to conscious favoritism of persons of one race or sex.

To avoid confusion, I will try here to describe our position using neutral terminology that stays away from convenient coined phrases.

The approach, henceforth, of the Department of Justice in the employment area in suits brought to enforce title VII and similar statutes can be simply stated. We no longer will insist upon or in any respect support the use of quotas or any other numerical or statistical formula designed to provide to nonvictims of discrimination preferential treatment based on race, sex, national origin or religion. To pursue any other course is, in our view, unsound as a matter of law and unwise as a matter of policy.

Race-conscious or sex-conscious preferences are, as history has shown, divisive techniques which go well beyond the remedy that is necessary to redress, in full measure, those injured by a particular employer's discriminatory practices. A brief backward glance through the tragic history of our experiences with racial distinctions in American life and the different Government responses, both legislative and judicial, that have been given will help to explain.

From the birth of this Nation, racial discrimination has stained the fabric of American law. The Declaration of Independence proclaimed the principle that all men are created equal, yet omitted a denunciation of slavery or the international slave trade. The Constitution of the United States, when originally ratified, accorded to black slaves a fractional status beneath that of free persons for purposes of apportioning representatives and taxes among the several States, and no rights to freedom, or the vote, or indeed any constitutional rights. Until 1808, the Constitution authorized the importation of slaves and directed "free" States to return fugitive slaves.

No lesser authority than the U.S. Supreme Court added its weight to the then prevailing attitude by holding in the infamous *Dred Scott* decision not only that the Constitution does not endow black Americans with citizenship, but that Congress lacks power to prohibit slavery in U.S. territories. That decision, together with a growing awareness of the inherent inequities embedded in the institution of slavery, ultimately led this country into civil war, which, in turn, led to ratification of the 13th, 14th, and 15th amendments. The compromises that ended Reconstruction, however, effectively ended Federal inquiry into matters of civil rights and discrimination survived the Civil War amendments.

The Supreme Court again contributed to this setback in fashioning the separate but equal doctrine in *Plessy* v. *Ferguson,* 163 U.S. 537 (1896). Only Justice Harlan, in a powerful dissent, sounded the note that was later to become the battle cry of civil rights groups across the land. In eloquent style, he insisted that the Constitution is colorblind and permits neither legislatures nor judicial tribunals to "have regard to the race of citizens when the Civil Rights of those citizens are involved."

It was a while, however, before this principle began to take hold. Under the separate-but-equal doctrine, opportunities were virtually always separate, but rarely equal. Discrimination based on race, color, or ethnic origin continued to be tolerated by the courts, not only against blacks but also against persons of Chinese or Mexican origin, and during World War II against citizens of Japanese ancestry. And, of course, women were relegated to second-class citizenship until suffrage was obtained and were generally treated separately and unequally in employment thereafter.

It was only after years of litigation in the courts that the Supreme Court, in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), finally overruled *Plessy* v. *Ferguson* and, following Justice Harlan's lead in dissent in the earlier case, held that the equal protection clause of the 14th amendment prohibits purposeful racial discrimination in all aspects of public facilities and functions.

The *Brown* decision spurred an unprecedented judicial and legislative quest to purge racial discrimination, both public and private, from American life. Significant mileposts along the way included the 1957 Civil Rights Act, the 1960 Civil Rights Act, the 1964 Civil Rights Act, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.

In the area of employment discrimination, title VII of the 1964 Civil Rights Act prohibited discrimination "against any individual with respect to his compensation terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *," 42 U.S.C. section 2000 e–2(a)(1). That title VII mandated nondiscrimination in employment decisions was made clear not only in the act's language but also in the legislative debates preceding its passage.

For instance, Senator Hubert Humphrey, a leading advocate of racial equality and a foremost proponent of the 1964 Civil Rights Act, unequivocally rejected the suggestion that title VII was intended to countenance race-conscious preferences. His words are worth restating: "It is claimed that the bill would require racial quotas for all hiring, when in fact it provides that race should not be used for making personnel decisions." 110 Cong. Rec. 6553 (1964).

In like manner, remarks by other proponents of the legislation endorsed the view that title VII established a principle of colorblindness in employment.

The basic outlines of the law are well developed and relatively clear. Title VII not only prohibits purposeful discrimination based upon race, sex, religion and national origin, but also prohibits employment practices which have a discriminatory effect, unless those practices are predictive of successful job performance or otherwise required by business necessity.

A unanimous Supreme Court so ruled in 1971 in a decision by Chief Justice Burger, and the Congress accepted that interpretation when it amended and extended title VII in 1972 through the Equal Employment Opportunity Act of 1972, and when in 1972 and 1976 it adopted the Revenue Sharing Act and amended it and the Safe Streets Act.

Where such provisions of Federal law have been violated, the courts have the power and duty not merely to eliminate future discriminatory practices but also to correct the effects of past practices. And the Supreme Court has made clear in *McDonald* v. *Santa Fe Trails Transportation Co.*, 427 U.S. 273 (1976), that this statutory prohibition against racial discrimination applies to protect white employees with the same force as it protects black employees.

During the late sixties and into the seventies minorities and women made significant strides in the field of employment with the assistance of such statutory and decisional law outlawing discrimination on grounds of race, sex and national origin.

Relief for individual victims, however, began to be expanded into class-oriented relief, fostering the use of new hiring requirements designed to achieve immediate numerical equality among the races in the workplace. Racial formulas, most notably in the form of hiring quotas, emerged under the byword of affirmative action. This new concept went well beyond the traditional view that a racial or sex preference is permissible only when necessary to place an individual victim of proven discriminatory conduct in a position he or she would have attained but for the discrimination.

In addition, affirmative action became associated with the endorsement of such preferential treatment to aid persons who were not identifiable victims.

The proponents of this view sought the granting of preferences not simply to individuals who had in fact been injured but to an entire group of individuals based only on their race or sex. It mattered not that those who benefited had never been wronged, or that the preferential treatment afforded to them was at the expense of other employees who were themselves innocent of any discrimination or other wrongdoing.

By elevating the rights of groups over the rights of individuals, racial preferences, such as I have just described, are at war with the American ideal of equal opportunity for each person to achieve whatever his or her industry and talents warrant. This kind of affirmative action needlessly creates a caste system in which an individual is unfairly disadvantaged for each person who is preferred. A divisive influence is inevitably introduced into the workplace, the community, and the country as a whole.

Nor is there any moral justification for such an approach. Separate treatment of people in the field of employment, based on nothing more than personal characteristics of race or gender, is as offensive to standards of human decency today as it was some 84 years ago when countenanced under *Plessy* v. *Ferguson,* supra.

I can make the point no better than Prof. Alexander Bickel did in his eloquent remark:

> The lesson of the great decisions of the Supreme Court and the lessons of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.

The Attorney General was no less articulate in his speech of May 22, 1981, before the American Law Institute in Philadelphia—pages 12 and 13—when he stated:

> While well intended, quotas invariably have the practical effect of placing inflexible restraints on the opportunities afforded one race in an effort to remedy past discrimination against another. They stigmatize the beneficiaries. Worst of all, under a quota system, today's minimum may become tomorrow's maximum.

This administration is firmly committed to the view that the Constitution and the laws of the United States protect the rights of every person, whether black or white, male or female, to pursue his or her goals in an environment of racial and sexual neutrality. The colorblind ideal of equal opportunity for all that guided the framers of the Constitution and the drafters of title VII holds greatest promise of lifting the incubus of race, national origin, and sex discrimination from the Nation, and of realizing the proclamation of equality in the Declaration of Independence.

By embracing the principle of equal opportunity without preference in the field of public and private employment, the Justice Department in no way intends to relax its commitment to remedy proven discrimination. Fidelity to the ideal of equality demands that no individual be disadvantageously circumstanced in the workplace because of unlawful discriminatory practices.

The Department is firm in its resolve to seek, in suits under title VII and similar statutes, affirmative remedies such as backpay, retroactive seniority, reinstatement, and hiring and promotional priorities, to insure that any individual suffering employment discrimination on account of race or sex be placed in the position that he or she would have attained in the absence of such discrimination.

In some circumstances, the granting of such relief will serve to advance individual victims into seniority positions, or onto career ladders, in preference to incumbent white or male employees shown to have been improperly favored. Similarly, appropriate relief should and will be sought for those qualified individuals shown to have been discouraged from seeking positions because of past practices of unlawful discrimination on the part of the employer.

Make no mistake about it; the Department of Justice will be unyielding in its enforcement efforts to deter and remedy completely identifiable injuries attributable to discrimination in the workplace.

In addition to seeking full redress for individual victims, the Department will continue to seek injunctive relief directing the employer to make employment decisions on a nondiscriminatory race-neutral and sex-neutral basis. To insure that the injunction is followed, we will require as part of the remedy that the employer make special efforts to reach minority or female workers through comprehensive use of employment recruitment techniques, such as media advertising and visiting high school and college campuses.

In connection with this enhanced recruitment of minorities or women, the Department will insist that the employer periodically file records of its recruitment efforts.

Where appropriate, we will seek percentage recruitment goals for monitoring purposes. Such recruitment goals will serve as a triggering mechanism for Department inquiry into whether the employer has complied with the injunctive command to end its discriminatory practices. These recruitment goals will be related to the percentage of minority or female applicants that might be expected to result under a nondiscriminatory employment policy, after job-related factors, such as age, education and work experience among various applicants are taken into account. When combined with fair and nondiscriminatory selection procedures, they should be sufficient to correct the effects of past discriminatory practices.

Because there may be legitimate nondiscriminatory reasons underlying an employer's failure to satisfy a particular goal, the Department will not treat recruitment goals as inflexible standards which must be met by the employer without regard to qualification. At the same time, we will be alert to guard against employers, in an overzealous attempt to satisfy recruitment goals, engaging in discrimination. Were we to treat the matter in any other light, we would be vulnerable to the charge that we have sought to meet discrimination with discrimination. This the Department will not do.

In sum, our approach will emphasize a three-pronged remedial formula consisting of: One, specific affirmative relief for identifiable victims of discrimination; two, increased recruitment efforts aimed at the group previously disadvantaged; and three, colorblind as well as sex-neutral nondiscriminatory future hiring and promotion practices.

It is our view that such relief will effectively overcome the effects of past discrimination without prejudicing the legitimate interests of others in the work force.

In conclusion, I wish to emphasize to the members of the Subcommittee the administration's commitment to enforce this Nation's civil rights laws. In the employment area we believe equality of opportunity can be achieved without resort to remedies which unfairly penalize those who are innocent of any discriminatory behavior.

Thank you. I will be glad to respond to any questions you may have.

Mr. HAWKINS. Thank you, Mr. Reynolds.

Mr. Reynolds, in your prepared statement and also in the statement made to the American Law Institute and other public utterances, you have suggested that reliance on quotas as a remedial tool to rectify present and past discrimination will no longer be relied upon, and I think you have made that point very clear this morning.

In view of the fact that most courts and businesses that operate today in the economy do make a distinction between goals and timetables that are routinely and systematically utilized by businesses to monitor their performance, may I ask you if you make any distinction between goals and timetables on the one hand, and quotas on the other?

Mr. REYNOLDS. Mr. Chairman, I think there is a distinction between quotas and goals and timetables, although I also believe that the distinction has through practice in a number of instances become blurred.

In my view, quotas are inflexible numerical standards which set a minimum which must be achieved. Goals, on the other hand, I think, conceptually are targets, if you will, which are flexible and in terms of the distinction that is available are not rigid numerical requirements.

I think that the difficulty has been that people have tended to use different labels to say the same thing and that quite often one man's goal becomes another man's quota.

I do agree, there is a distinction and the distinction would relate to whether there is a rigid requirement to meet a certain numerical objective, as opposed to a more loose, flexible target which one then would seek to achieve.

Mr. HAWKINS. Recognizing that there is a distinction and granted that it is sometimes blurred in operation, deliberately or otherwise, do you believe that an agency such as yours, which is in a position not to blur it, not to misuse it or to abuse it, could reasonably have goals and timetables to effectively uphold the law, rather than abandon it? On that basis, do you think it is sometimes misused, that it is necessary to sacrifice goals and timetables because they may be construed to be quotas?

Mr. REYNOLDS. We are prepared, Mr. Chairman, to make use of goals in the area of recruitment. It seems to me that when you confine the use of goals to that area you then do not run into the difficulty of employers using the goals as quotas, which seems to very frequently happen when you talk about goals and timetables as hiring standards.

I think that in the area of recruitment it certainly makes some sense in appropriate cases to set a goal based on the percentage, if you will, of expected minority participants in a labor force that realistically can be defined in terms of job credentials or job-related credentials.

Mr. HAWKINS. Inasmuch as you would use them in terms of recruitment, why would you then abandon them when it comes down to the actual basic process of hiring individuals? Why would goals be useful merely in terms of advertising or making some efforts to go out to recruit individuals, if at the same time discrimination is allowed among those who are recruited?

In what way is it consistent with the nonuse of goals as you have suggested?

Mr. REYNOLDS. I guess two things: We would not allow discrimination in the hiring aspect of the process, but the use of goals at the recruiting end is a monitoring technique, or a triggering device, only. It is a means by which the Department could look to see whether the employer is, in fact, living up to the injunction against discriminatory practices in the employment area.

We would not be looking to goals or using goals as a standard for an employer to meet in his hiring, but we would simply look to that as a guidepost, if you will, if there were an expectation that some 20 percent of the applicant pool in a job market would be represented by minorities, and we had only two minorities that were hired in a particular job for 100 places, I think that that would suggest to us that there is a reason for inquiry.

At the same time, as I indicated, we would use the goals in terms of our monitoring activity to be sure that an employer is not simply hiring numbers of people without regard to qualifications, simply to reach some numerical objective. But goals as we have described them would not be used for any purpose other than a monitoring mechanism to, if you will, check the progress of an employer or the attention the employer is giving to the court injunction against discriminatory practices.

Mr. HAWKINS. Let us take a hypothetical case of a company that has a record of discrimination and is obviously, let us say, without minorities and women in its workforce, is perhaps a Federal contractor, and let us say, has pending against it a countless number of charges of discrimination, and you have every reason to suspect or you have investigated and found that it has a record of discrimination. Yet with your having abandoned the concept of affirmative action, how would you go about correcting past discrimination of that company on the theory that you are not going to be conscious of the color of the individual or the sex of the individual? Just how would you proceed in an instance such as that?

Mr. REYNOLDS. Certainly, I would look to determine which individuals could be identified as having been the subject of the discriminatory conduct, and those individuals who can demonstrate that they either were denied the opportunity to have a job or those who could demonstrate that they had refrained from applying on the knowledge that this was an employer that would not in any event recognize their application, it seems to me, would be entitled to full individual relief.

In addition to that, I believe that the employer should be enjoined from any discriminatory practices in the future. It would be, I think, as an element of that relief in that regard, appropriate to use the recruitment aspect of the remedy that I talked about to monitor the employer's activity, to be sure that he is acting in a nondiscriminatory fashion in the future.

Mr. HAWKINS. In other words, you are going to rely heavily on the specific individual being able to prove discrimination and willing to run the risk of proving it in order to have enforcement in an instance such as this hypothetical case that I have presented to you?

Mr. REYNOLDS. Generally that is right.

Mr. HAWKINS. Short of that, there will be no correction?

Mr. REYNOLDS. Well, there will be an injunction to stop discriminatory practices.

Mr. HAWKINS. What about the individual already suffering? We are dealing with a hypothetical case of those who have already suffered past discrimination.

Mr. REYNOLDS. Those individuals who have been wronged are entitled to that relief.

Mr. HAWKINS. On an individual-by-individual basis?

Mr. REYNOLDS. That is right. But those individuals who may be part of the class that is wronged, but who themselves were not wronged, would not be people who I feel are entitled to receive an advantage by virtue of the discriminatory practices that were directed at others.

Mr. HAWKINS. What about those who, let us say, have been advantaged by the fact that discrimination has been practiced. Take for example, two individuals, one who gets a promotion who is not a minority, let us say a white male gets an advantage by virtue of discrimination and somehow continues to enjoy that advantage; and on the other hand, one who was discriminated against and who was kept from promotion, unless that individual is willing and able to come forward and prove the case, will the Government not act in his or her behalf?

Mr. REYNOLDS. Generally, I would agree with you, Mr. Chairman.

Mr. HAWKINS. Could you be specific? How would you agree or disagree?

Mr. REYNOLDS. Specifically, I think the individual who, let us say, has been shown to have been advantaged by the discrimination, is the individual who, as I discussed in my testimony, would be the one that would have to bear the burden of a preference that would be afforded to a victim of that discrimination.

Mr. HAWKINS. Under your approach, that individual would be helped by the Government because of the charge of preferential treatment. As to the other individual, certainly that individual might not have wronged anyone specifically, certainly not with any intent, but still enjoys an advantage. It seems to me what you are really suggesting, to get away from the hypothetical case, is that you are going to operate on an individual-by-individual basis rather than on a group basis; is that correct?

Mr. **Reynolds**. I think that is basically correct. We are going to require that people who are wronged by discrimination be put in a position they should have attained but for the discrimination.

If that remedy entitles them to preferential treatment over those who were "advantaged" by the discrimination, I think that would be appropriate relief. But I do not believe that people who have not been able to demonstrate they have been injured by discrimination are entitled to the same kind of preference either under the Constitution or title VII.

Mr. **Hawkins**. The only thing I can suggest is that the administration is deviating from past experience under both Republican and Democratic administrations since the administration of Franklin Delano Roosevelt. This is indeed a shocking departure, it seems to me, in the field of civil rights.

I can only suggest to you that if you are going to proceed as you suggest, that the cutback in funding for the civil rights agencies, which has been very substantial, is certainly unjustified, because if you are going to operate on an individual basis, obviously you are going to need a doubling or tripling of resources for the agencies, otherwise you will have the problem of a backlog of cases building up over a period of time. The agencies were just beginning to make some progress remedying that problem. If every individual is going to have to wait 2 or 3 years before the complaint is processed, it seems to me this is what we are going to go through, and we will be concerned, I think, in this committee with what I consider to be a real setback and a tough job of trying to oversee the agency.

I just don't see how you can operate on that basis. I don't think you have the staff to do it, even if you had the commitment. I think that you are asking for a lot of trouble in trying to handle an impossible job with a limited staff by going in the opposite direction to the way it should be going.

Mr. **Reynolds**. Mr. Chairman, I guess I would respond to that by saying that to my knowledge the Department has always had as an element of relief in cases of this sort redress for the individual who is shown to be wronged. That is not a new dimension or suggests an additional burden on the Department's enforcement resources. That has always been an element of the cases and will continue to be an element of the cases.

What I am suggesting to you is that to the extent that relief has included, in addition to that, race-conscious or sex-conscious preferential treatment for a class as a whole without regard to whether those members had been disadvantaged, that that is the area in which we are taking a different approach.

Mr. **Hawkins**. Your approach is the same approach that the rich as well as the poor have a right to beg on the streets. You are saying that whites and blacks are going to be equal, but that there is no remedy if there is discrimination, The Government is not going to be on the side of the individual who is discriminated against unless that individual has the means, patience, time and the freedom to complain and to have something done about it.

The people who are ordinarily discriminated against are frequently without the actual means of proving discrimination. If the Government is not going to be on their side in the case, then you are asking for the impossible, it seems to me.

I just regret that we are moving in the wrong direction.

Let me yield at this time to others.

Mr. REYNOLDS. Let me say that the Government is on the side of the people who have been discriminated against. What we are concerned about is the practice of employing relief where discrimination is met with discrimination in terms of trying to cure the ill.

I think that our view is that that is something that runs counter to the Constitution and to title VII, and we don't think that that kind of preferential treatment is in the law.

Mr. HAWKINS. It seems that you are abandoning affirmative action and wiping it off the books as a weapon to be used when this has been upheld consistently by both Republican and Democratic administrations. I think you are embarking on a new course and getting way out into waters that no one has yet been able to show would prove satisfactory in the elimination of discrimination. It is a protection to those who are discriminating and we have not had one suggestion this morning of one single change in the administration of the law that would be on the side of those discriminated against.

Consistently, every suggestion that has been made has been to protect those who might discriminate either directly or indirectly.

I think that we should have some balance. There ought to be something that we should do to elimiate some of the confusion in the law, to improve the system. We certainly should eliminate some of the paperwork.

We certainly should have better efficiency. There are things we could do to help the business community.

It seems to me that what we are doing now is taking away all the protections from those who are being discriminated against without, at the same time, adding one single thing which is going to help them, including the funding support for the agencies investigating individual complaints of discrimination.

The individual discriminated against may be the one least able to afford to prove that he or she has been discriminated against.

Mrs. FENWICK. May I ask some questions?

Mr. HAWKINS. Mrs. Fenwick, I was going to yield to Mr. Petri. If he cares to yield to you, I will be very glad to recognize you.

Mr. PETRI. I yield on the basis of sex.

Mrs. FENWICK. I worked very closely in cases of discrimination in my State, for many reasons, being chairman of Governor Hughes'—Democratic Governor Hughes'—Committee on Equal Employment Opportunity.

What I found was this—and I would like to ask you if it will continue—when somebody wrote, telephoned or spoke to me about a case of discrimination, I would find out where it was taking place; if it was a section of the company plant, what section; if it was unfair pay, with two production lines that were absolutely similar but paid differently, with the categories divided so that the white males would receive the high wages and the others would be in the other line.

One of the cases resulted in some $250,000 in back pay to the particular people working on that second line. I would telephone, without giving the name of the employee so there would be no question of any danger of their being fired, and I would get action on the part of the Department to move in, and they knew exactly where to look. They did not ask for anybody because I did not give them the name, and I did not want anybody to get fired in the course of this would-be benevolent activity.

That was very successful. Could that continue? Suppose I called and say one of my constituents has been so discriminated against, and I say I don't want them fired so I can't give you the name, but would you please inspect such and such a line in such and such a place, section B?

Mr. **Reynolds**. We would certainly move against that and move as vigorously as we have in the past.

Mrs. **Fenwick**. So there would be no change in your ability—

Mr. **Reynolds**. To go after that kind of discrimination or any similar kind of discrimination in the work force. I think that is probably part of the response to the Chairman, that the division does not intend to back off in its responsibility in terms of going after employment discrimination. We intend to go after it; we intend to seek as full a remedy as we think is permissible or appropriate under the law, and we will not back down from that at all.

Mrs. **Fenwick**. Would you still have the power under the law to require the pay slip as evidence to show unequal pay for equal work? Would you still have the power to require those books?

Mr. **Reynolds**. Certainly we would have the power to do it, and we would proceed to do that without hesitation.

Mrs. **Fenwick**. I was very happy to see your idea about recruitment, because some of the companies in my State have indeed moved forward and brought in guidance counselors to explain what jobs are open in these particular companies. I don't think that is enough.

I think a mixed group from the company should go into the high schools and, for example, by their very composition and without stressing race or sex or anything, by their very composition show, "I am a nurse. If you want to be a nurse you have to be good in this subject." "I am a doctor and if you don't brush up on chemistry or math, you won't get into medical school" One is black, one is female.

Mr. **Reynolds**. I agree with that. There is certainly room for that under our policy.

Mrs. **Fenwick**. These employees could explain what skills are needed for the particular position, "I am an accountant, truck-driver"—whatever is needed for the particular occupation and then by the composition of the group that comes from the company, show fair employment more clearly than sitting quietly in some office with the guidance counselors. That is good, but it is not perfect. It is less inspiring and less convincing, than a team to go directly into the schools.

Thank you.

Thank you, Mr. Chairman.

Mr. **Hawkins**. I think you have used about 4 minutes of Mr. Petri's time. If Mr. Petri would like to use some of his own time—

Mr. **Petri**. I have one or two questions.

Do you recall how many different categories there are that employers or others are supposed to keep track of, that they are required not to discriminate against or that they give preference to? I undertand it is 25 or 26 different—

Mr. **Reynolds**. I am not sure I understand your question.

Mr. **Petri**. I am trying to get a reaction to the Sears case I believe, the employer said,

> Could you please set some priority for us because if we have to give preference to all the different categories that are referred to as categories, it adds up to over 100 percent, and what do we do if we have a series of applicants who are from different minority groups, which ones do we hire first?

Of course, the courts are not going to touch it. They would prefer that the Congress or the administration try to set priorities or else I guess they leave it up to the individual company, but they are not going to help them. Is that an area that is a problem area or not?

Mr. **Reynolds**. I am not sure how much of a problem area it is. I think in terms of the testimony this morning that our view would be that the company should engage in nondiscriminatory practices in all areas and it would be incumbent on the company to demonstrate that it is living up to an injunction of that scope.

We would ask the court to insist that there is no discriminatory conduct in any of the company's areas of employment.

Mr. **Petri**. We are required, I think, to extend some protection to groups ranging from the Aleuts in Alaska to veterans and so on. Are there some you are aware of that do not receive such protection that we should extend that to? Are there other groups that should be added?

Mr. **Reynolds**. Special protection in terms of what?

Mr. **Petri**. In terms of the civil rights protection we are talking about here this morning?

Mr. **Reynolds**. I think that the protections that you are referring to relate to the—is it the American natives and Alaskans?—those, as I understand, are the subject of special legislation that is designed to attend to special cultural and societal norms of those particular groups, the only ones I am aware of.

I would not suggest legislation to expand that.

Mr. **Petri**. Thank you.

Mr. **Hawkins**. Mr. Washington?

Mr. **Washington**. Thank you, Mr. Chairman.

Mr. Reynolds, I find your testimony extremely disturbing and also perhaps revealing. It is disturbing for several reasons. First, it seems to me to lack any conception of what the problem is all about. Racism is a factor; sexism is a factor. They are part of the mainstream of American life, so to speak.

I am reminded of a situation of a friend of mine who teaches at the University of Chicago, a devotee of Milton Freedman, I would say, who wanted to buy a factory and reopen it in a small town outside of Chicago.

In talking with the officials there pursuant to making arrangements to open the factory, the one question that quite a few of the officials asked him in a rather raspy manner was, "You don't intend to hire any blacks in this factory, do you?" making very clear that blacks weren't wanted. It was a shocking experience for my friend, but one which I am glad he got because he didn't understand that racism is a factor of American life.

All through your presentation I could not detect that you really understand this. Blacks did not create the problem; women did not create the problem; it was thrust upon us. What has happened over the years is that Congress, the courts, and the Chief Executives have attempted to fashion some meager tools to at least put the finger in the dike, if not to completely resolve the problem.

I find your presentation lacking in many things that I think it should carry. For example, there are a number of points in your testimony where you suggest interpretations of major title VII cases which do not correctly reflect majority opinions of the court. For example, you ignore the Supreme Court's opinion in *Weber* v. *Kaiser,* and you appear to be relying on Justice Rehnquist's dissent.

For example, you say that numerical and statistical formula are unsound as a matter of law. That is not true. The Court did not find any such thing. The Court said, title VII does not forbid employers and unions from adopting race-conscious affirmative action plans to eliminate conspicuous, specific racial imbalance in traditionally segregated job categories.

The Court went on to say,

> It would be ironic indeed if a law triggered by concern over racial injustice and intended to improve the lot of those who had been excluded from the American dream so long, were to institute a legislative prohibition against voluntary, private, race-conscious efforts to abolish the traditional patterns of racial segregation hiring.

That was your Court's position. Your statement that sex- and race-conscious remedies and numerical formulae are wrong as a matter of law is not correct.

You may not like that, but it is not accurate to say they are prohibited by law. I hope your policy has not been based on a misinterpretation of existing case law in this area.

I want to make it clear that you are departing from established case law, reversing Federal policy in this area, not because you have to, because you don't have to as a matter of law, but because you want to. That is the way I read it. Do you want to respond to that?

Mr. REYNOLDS. I guess that we do have a bit of a disagreement.

Mr. WASHINGTON. That is a major understatement.

Mr. REYNOLDS. I appreciate that the situation that has existed throughout the years with respect to the uneven and unequal treatment of blacks is not a product of the blacks' making or doing. I understand that. I think it is a product of a practice that has existed in this country far too long, where unlawful discrimination based on race has been tolerated.

I think that we are turning the corner and this country is looking to address that problem in a meaningful way.

To me, it is difficult to justify addressing a problem which is generated by unlawful discrimination based on race by using discriminatory means based on race. I do not believe that two civil wrongs make a civil right.

Mr. WASHINGTON. Isn't that just a play on words?

Mr. REYNOLDS. I don't believe it is a play on words. I think it is fundamental. I think it is in title VII. I think it is in the Constitution. I believe that the *Weber* decision, which I agree is a very narrow decision, certainly does not have application in the public sector of this area where, of course, the Department's primary responsibility lies. It arose in a situation in the private sector and I wonder whether the Court would have given the same response if State action had been involved. It was very careful to go to great length to say they were not looking at that separate question, if there had been a constitutional aspect to it.

I don't believe it is a play on words.

Mr. WASHINGTON. In the *Kaiser* case it was called voluntary, voluntary in the sense they did it without necessarily a court order, but not voluntary in the sense that the pressure of a possible suit was pending. So they voluntarily got out ahead of the operation and decided to clean up their act.

Your posture, it seems to me, will destroy the basis for future voluntary decisions that you seem to think you want.

Mr. REYNOLDS. I think future voluntary action of that sort is certainly to be encouraged as long as it is not premised on a notion of providing a preference to nonvictims of discrimination based solely on their race or their sex or their national origin.

Mr. WASHINGTON. You coined a phrase, "nonvictims" by which, first of all, you are charting a new path. This concept runs throughout your testimony. Yet the whole point of discrimination is that it operates against groups, not individuals. A black man or a woman is discriminated against, not because they are individuals but because they are members of a group. That is the whole point of affirmative action, goals and timetables, back pay, and so forth. That is the whole point, that an individual suffers because he or she is a member of a group.

So, the concept of "nonvictim" sort of escapes me. You cite history, the Reconstruction period. You had better read a little closer because the analogy is so close it frightens the heck out of me. The same charade that we went through in the Reconstruction era, we are going through now, with, for example, pulling back on support of the Voting Rights Act and on laws and programs designed to encourage blacks as freed men getting jobs. The analogy is so close it is frightening.

Your concept of nonvictims escapes me. There is no such thing, sir. If you are a member of a class in this country, or of a race in this country, then you bear the burden of a certain onus placed upon that race by the dominant society. It is a fact of life. Your presentation ignores that completely. If you say that the redress or the relief should be individually focused, you are getting away from the entire problem. Is that purposeful?

Mr. REYNOLDS. I guess I don't agree with your conclusion that you came to. I am addressing the law enforcement responsibility under title VII. That law enforcement responsibility said that you ferret out and target discriminatory practices by employers against employees in the work force. By any conceivable reading of the legislative history, it is clear that was not intended to foster or encourage class relief that would provide preferences to people who had not been disadvantaged by the particular employer's practice based solely on their race, sex, or national origin.

What I am suggesting to you is that the enforcement arm of the administration is going to proceed to pursue vigorously title VII employment cases of discrimination and that the relief we are going to afford is the relief that I believe is contemplated fully by the statute, its language and its history.

Mr. WASHINGTON. You are summarily abolishing a whole body of regulations and rules from EEOC without consultation with Congress, without any consideration of the agency itself. You are abolishing rules and regulations and taking over, lock, stock and barrel, the whole EEO operation.

Mr. REYNOLDS. I think we ought to be careful about exactly what I am saying and what I have addressed today.

There is a body of rules and regulations that has been promulgated under Executive order—I believe it is 11246. That body of rules and regulations does in some respects incorporate specific procedures that go to the affirmative action area. The enforcement of that body of law, if you will, is something that is separate from title VII enforcement.

As you are aware, those rules and regulations are part of the review process that the Vice President's task force is now undertaking.

I have not addressed in this testimony that other area which I think is certainly a legislative matter and an appropriate topic of discussion, but I believe it is not within the framework of the testimony I gave today that was addressing the Department of Justice's enforcement responsibility under the law and under title VII and similar statutes.

Mr. HAWKINS. Would the gentleman yield on that point?

Mr. WASHINGTON. Yes.

Mr. HAWKINS. Your response seems to indicate that you are speaking with reference to title VII, yet your case and your references are primarily to private employment. In view of the fact that title VII, Justice Department jurisdiction applies to State and local governments as opposed to private employment, are you articulating the position of the administration with respect to title VII, or merely to that part of title VII which applies only to the jurisdiction of the Department of Justice? Because you seem to be saying that this is a change in policy for all title VII enforcement, which would include private employment.

Mr. REYNOLDS. Mr. Chairman, let me try to explain it.

Mr. HAWKINS. Which is it?

Mr. REYNOLDS. The cases that are cited which relate to private employment are cases that were brought before the 1972 amendment to title VII. Prior to that time the Federal Government was enforcing private discrimination. In the 1972 amendment, the State and local enforcement responsibility was given to the Department of Justice and private responsibility was given to EEOC. I think that those cases demonstrate, as do other cases, that the standard of title VII applies equally to private and public employers.

My feeling is that that standard of enforcement should be one that the Government should apply on an evenhanded basis, since we speak with one voice with respect to the title VII question.

Mr. HAWKINS. There are two things about that which disturb me: One, are you speaking for the Equal Employment Opportunity Commission, or should this committee have that commission come before it and speak for itself; Two, are you speaking merely for the

Department of Justice enforcement of that part of title VII which relates only to State and local governments?

If you are speaking for the broader aspect, then obviously what you are suggesting to us this morning is a much broader change in policy than any that we have had before us.

Certainly, systemic discrimination, for example, and action on a group basis, have both been greatly supported by court decisions. The body of the law applies very strongly in that direction, but you seem to be changing all of it. If you are changing not only your own jurisdiction but also anticipating that eventually the Department of Justice is going to be enforcing all the civil rights laws with respect to discrimination, then certainly this is more ominous than what we even feel this morning——

Mr. REYNOLDS. I am not suggesting the latter.

Mr. HAWKINS. That is being discussed, incidentally, in the closet, not publicly, but certainly I think it is even more ominous.

My specific question is, are you covering the policy with respect to title VII or only with respect to that part of title VII which relates to your own jurisdiction?

Mr. REYNOLDS. I am speaking today about the Department of Justice's enforcement responsibility under title VII and those similar statutes.

Mr. HAWKINS. And not EEOC?

Mr. REYNOLDS. I would suggest it would probably be well to have the Equal Employment Opportunity Commission appear before you to testify.

Mr. HAWKINS. We hope they will respond a lot faster than they have so far to the request to appear, in any event.

Mr. WASHINGTON. Is it not EEOC's responsibility to set Government-wide policy in this area?

Mr. REYNOLDS. The EEOC has responsibility to review, as I understand it, the rules and regulations under its Executive order in the area of civil rights. I believe that it has a coordination responsibility in that regard.

Mr. WASHINGTON. Coordinating authority?

Mr. REYNOLDS. Yes, with regard to the Executive order, as I understand it.

Mr. WASHINGTON. One final question: I am not sure what you are really saying, Mr. Reynolds, in terms of enforcement policy. For example, will the Department of Justice no longer bring class action suits?

Mr. REYNOLDS. My understanding is that the suits that we bring are pattern and practices, and we certainly would continue to bring pattern and practices. That is the nature of the suit, I believe.

Mr. WASHINGTON. If a suit were brought against a police department which had historically discriminated, would you object to a remedy aimed at accelerating the integration of qualified minority candidates into that police department? Would you object to such a remedy?

Mr. REYNOLDS. I would feel it inappropriate to have a remedy if an acceleration were based on nothing more than race or sex.

Mr. WASHINGTON. I yield at this time.

Mr. HAWKINS. Mr. DeNardis?

Mr. DENARDIS. Thank you, Mr. Chairman.

I think we are moving back and forth here from Executive orders to provisions of the statute and the same law does not prevail across these different provisions. But in the spirit of your presentation, which is really sort of a philosophical basis for the administration's interpretation of affirmative action, let me ask this question. On page 5 you say that:

> Affirmative action means different things to different people, ranging from simple diligence in insuring against discrimination to conscious favoritism of persons of one race or sex.

Affirmative action may mean different things to different people, but affirmative action means to those of us in Government, and where Government rules and regulations are applied, something that is decidedly not the first interpretation, which is never passive but rather an active policy of pursuit. That is what affirmative action legally and philosophically means, at least what it has meant to me in the years I have been in the State senate and now as I view it from this perspective, a policy of active pursuit in employment.

In some reasonable way we see a reflection of the community demography.

I want to know, as you are trying to recast your interpretation here, what level of activity you see, because it has never been a passive policy. Affirmative action moves beyond passivity to specific activity. We may disagree as to what level of activity ought to be pursued. I just want to get a fix on where you see that activity.

Mr. REYNOLDS. I see that activity focused principally at the recruitment stage of the process.

Mr. DENARDIS. Recruitment goals?

Mr. REYNOLDS. In terms of seeking to reach those communities that have not been reached and to have a more intense effort at approaching minority groups or those people who have not in the past been approached in order to bring them into the applicant pool.

I would think in that area the active effort would be something that would be encouraged and appropriate as part of the relief that you have in mind.

Mr. DENARDIS. I think that should be made clear. Whether I agree with that or not, you are still talking about an active policy. It may not be as active as some people, including myself, would like, but you are not talking about sitting back and responding or reacting to a particular wrong as it develops? You do contemplate a policy of activity?

Mr. REYNOLDS. I think that is right. I think that we would expect that if the recruitment effort were conducted in an active way and that there was the absence of discrimination, that the hiring by the employer commensurate with the racial composition of the applicant pool should reflect that composition, and it would, it seems to me, provide also a better ability, in the event that it doesn't, to identify those individuals who have been victimized by a continued discriminatory course of action, and then to provide them the redress that we believe they are entitled to.

Mr. DENARDIS. And then in fact there would be a quota plan?

Mr. REYNOLDS. No; I don't believe there would be a quota plan. I think any individual who demonstrates that he or she has been discriminated against and injured by discrimination is entitled to be put in a position that that individual would have attained and would have been in but for the discrimination.

Mr. DeNardis. I yield back, Mr. Chairman.

Mr. Hawkins. Mr. Clay?

Mr. Clay. Thank you, Mr. Chairman.

That individual who encountered discrimination that you just spoke of, is it individual discrimination or group discrimination? When you talk about remedies for individuals, are we actually talking about individuals who have been discriminated against, or are we talking about groups of people who have traditionally been discriminated against?

Mr. Reynolds. About individuals who have been discriminated against.

Mr. Clay. Because of what?

Mr. Reynolds. Because the employer has pursued a practice of excluding those individuals from his work force based on personal characteristics such as race or sex or ethnic origin.

Mr. Clay. So, we are really talking about groups? It would fit in the definition you just gave this committee?

Mr. Reynolds. I would certainly include any and all people who had suffered as a result of that discriminatory practice. If that is more than one person—I don't know whether a group is two.

Mr. Clay. Why should the remedy have to be individual if discrimination is against a group?

Mr. Reynolds. I think the remedy should fit the wrong. The individual who has been disadvantaged is entitled to be put back to the place where he or she would have attained. What we don't subscribe to is taking a group of people who also are in that same minority class, who were not discriminated against or denied the opportunity to work for this particular employer, and by a preferential affirmative action plan allow them to be benefited at the expense of others who have done no wrong who are in the work force.

Mr. Clay. You just said if the company had policies and practices which discriminated, you would deal on an individual basis to remedy those individuals who had been discriminated against?

Mr. Reynolds. And enjoin that discriminatory practice from continuing.

Mr. Clay. At the same time you are abandoning the whole concept of affirmative action and you refer to it as preferential treatment? Explain to me how, when racism has become institutionalized, sexism has become institutionalized, in a company or in a system, in a society, in a government, you deal with it unless you deal with it at the institutional level in terms of changing all of those things that have prohibited people, because of the definitions you gave, from getting employment, unless you take some affirmative action? If you don't move to change that institutionalized racism, how is it ever changed? Voluntarily? On its own, or what?

Mr. Reynolds. I believe it changes by redressing the wrong to the individual and by ending the discriminatory conduct so that it does not continue in the future.

As an element of that, if the employer engages in more intense and widespread recruitment activities, in that way that will assist in remedying, as you call it, institutionalized discrimination.

Mr. CLAY. If racism is pervasive, and I think evidence indicates that it is in this country, tell me which individuals you are going after or you intend to go after, who are discriminated against because of race and sex?

Mr. REYNOLDS. I think you go after anybody who is discriminating against people because of race and sex.

Mr. CLAY. Whom are you going after?

Mr. REYNOLDS. I think you are going after any and all employers who have a pattern and practice of discrimination. That is the charge that we have under title VII. I don't think we can be, if I may use the word, discriminating, with respect to the employers that fit in that category. We will pursue that charge under title VII and go after all those employers.

Mr. CLAY. Whom have you gone after so far? How long have you been in the office?

Mr. REYNOLDS. I have only been in 2 months, Congressman. As I stated at the outset of my testimony, there are a number of initiatives that we have taken and are taking and there will be a number more that we plan to take. We will continue to pursue this area as a high priority area of the Civil Rights Division.

Mr. CLAY. Can you be specific about whom you are getting ready to go after? Somebody has got to be discriminating if discrimination is pervasive.

Mr. REYNOLDS. I understand that, but it would be inappropriate for me at this juncture to give testimony on specific investigations underway or specific cases.

Mr. CLAY. I believe if I phrased the question in a different manner you probably would very willingly tell me who is guilty of reverse discrimination, would you not?

Mr. REYNOLDS. I am sorry. What was your question?

Mr. CLAY. If I phrased the question in a different manner, you would probably very willingly tell me who is guilty of reverse discrimination, because you would probably say the City of Washington, D.C., in its lottery system to hire policemen or firemen, would be in violation of the law. I would imagine that you would say that after reading your testimony here on what you refer to as "preferential hiring." Even though you said you were not going to use the convenient, coined phrases in your statement, it is filled with those convenient, coined phrases.

Could you tell me who is guilty of reverse discrimination then?

Mr. REYNOLDS. I cannot give you a different answer and would not give you a different answer. It seems to me that it is inappropriate to be discussing litigation, whether it relates to discrimination or, as you term it, race discrimination. We do not discuss investigations that are underway or cases that are underway, and I think it would be inappropriate for us to engage in that kind of dialog.

Mr. CLAY. What is the logic of your offering sex/colorblind remedies to address sex/color-conscious discrimination?

Mr. REYNOLDS. What is the logic?

Mr. CLAY. What is your logic in offering sex/colorblind—and I am quoting—remedies to address sex/color-conscious discrimination?

For example, if underutilization is a problem, how can your remedy be corrective and, if corrective, how can it not be preferential if you are going to correct it?

Mr. REYNOLDS. Underutilization or underrepresentation is a concept included in a number of regulations of different agencies under the Executive order. There are many procedures that are associated with that concept and how that then works itself out in the work force. That really is an area that is removed from the title VII enforcement area that I have been discussing today.

Mr. CLAY. Tell me how colorblind remedies which you are offering do anything to halt the unfair advantage which white individuals gain over minorities solely by virtue of their race when discrimination occurs?

Mr. REYNOLDS. I think that what this remedial relief formula does is directly address the problem of employment discrimination. It provides a remedy to end that discrimination in the work force. It does provide full relief for those individuals who can demonstrate they have been injured by it.

What it does not do is meet that kind of discrimination with discrimination. That is what I said a number of times in my testimony in response to questions. I think that what everybody is intent on removing is discriminatory conduct based on race. I think it is inappropriate to discuss relief or discuss the eradication of that evil by relying on the same kind of offensive sort of discriminatory conduct that fostered the problem in the first place.

Mr. CLAY. So you say that you should not meet discrimination with discrimination? In other words, are you saying that by equalizing present discrimination that you are addressing past discrimination?

Mr. REYNOLDS. I think that probably at the heart of the disagreement that we have is the extent to which the sins of past generations are a proper topic of relief in a single court case. I am suggesting to you that it is not the intent of the law nor, I think, the purpose of the Constitution, to try in a single court case to go back and cure all the evils of past generations.

I think that what we are about is taking each of the cases that involve employment discrimination and redressing the injury that has resulted from those cases to the fullest and best means that we are capable of doing consistent with the fundamental principle in the Constitution of equal employment opportunity, which is also embedded in both the language and in the legislative history of title VII.

Mr. CLAY. The Constitution you speak of had major defects in it and you pointed them out in your testimony, as I read about the free persons for purposes of apportioning and taxes, human bondage, denying women the right to vote by definition of who was qualified.

Now, when they got around to try to correct some of these inequities, did they say that we have to do it on a case-by-case basis individually, or did the 13th, 14th and 15th amendments address the problem of groups? I guess the 22d or whatever, the women's voting rights amendment, did say each woman had to do it; or did they address the problem as a group?

Mr. REYNOLDS. I think they addressed them as groups. I think the appropriate course for one to take in the event you are going to try to achieve some kind of group or class remedy to a problem is through either the legislative or the constitutional route. It is not appropriate, in my view, for the courts to be providing that role or performing that function, that the courts are supposed to enforce the statute, which in this case is essentially title VII, and to eradicate the employment discrimination existing in the work force of a particulr employer.

Mrs. FENWICK. I would agree with you that, if you are looking for class relief, there are other places that it is more appropriate to turn to in order to effectuate that kind of relief.

Mr. CLAY. As I understand what is going on here, it is not the courts; it is the Assistant Attorney General who is reinterpreting what the law is. You are coming in here and saying, in a sense, that it is against the law for you to take affirmative action to eradicate all the discrimination that is taking place in this country. Is that basically what you are saying?

Mr. REYNOLDS. To the extent that affirmative action incorporates a concept of race-conscious or sex-conscious preferential treatment for a class of people who are not those that can demonstrate their part of the group that was victimized by the particuar discrimination, I would agree.

Mr. CLAY. Is it your opinion that the extension of the rights of one group treads on the rights of another group?

Mr. REYNOLDS. I don't think it necessarily needs to do that, no. My contention would be that in extending the rights of one group we should be careful and be terribly attentive that it not tread on the rights of another group.

Mr. CLAY. Thank you.

Mr. HAWKINS. May I ask you this question: Did I understand, in reply to Mr. Clay, that you said that the administration policy is not to address the effects of past discrimination?

Mr. REYNOLDS. I don't believe I said that. I said we would pursue as vigorously in our enforcement area——

Mr. HAWKINS. Would you simply clarify by telling us in what instance or under what conditions you would redress the effects of past discrimination?

Mr. REYNOLDS. You address the effects of past discrimination by using the three-pronged remedial formula that I have set forth on page 16 of my testimony.

Mr. HAWKINS. That is the first full paragraph?

Mr. REYNOLDS. That is right.

> In sum, our approach will emphasize a three-pronged remedial formula consisting of (1) specific affirmative relief to identifiable victims of discrimination; (2) increased recruitment efforts aimed at the group previously disadvantaged; and (3) color-blind as well as sex-neutral nondiscriminatory future hiring and promotion practices.

Mr. HAWKINS. Let me quote you from a statement made by James E. Jones, professor of law at the University of Wisconsin, which I think describes the administration's approach. He says:

> Acceptance by the courts or other governmental entities of the notion of reverse discrimination puts the country in an impossible position. The only feasible way to

remedy the underparticipation of some groups (that is, in employment) is to devise programs specifically aimed at the members of these groups. For example, if underutilization of women or blacks is a problem, it would be patently idiotic to craft a remedial program that ignored sex or race.

It seems to me that is exactly what you are telling us, accept something that is patently idiotic, ignoring the fact of the discrimination having been based on sex or race, that in fashioning the remedy you are going to ignore it?

Mr. REYNOLDS. Mr. Chairman, you do have an advantage over me. I have not seen the statement.

Mr. HAWKINS. I will be very glad to give you the statement, because I think that there were some other excellent statements made and cases cited which I think place reverse discrimination, to use that term, in an impossible position.

What you are saying, in effect, to individuals who have been discriminated against, is that you are not going to give them an advantage but merely use the same method to discriminate against them, to remove that discrimination and not treat them as a group when they have been discriminated against as a group, that it is wrong to do so. Is it in a sense reverse, in that you are reversing for a desirable constitutional end and that becomes bad, but you ignore the fact that that is the basis on which they have been discriminated against.

So, in a sense, the term "reverse discrimination" used in its purest sense is not generally understood.

I will be very glad to supply you with a copy of the entire statement. If you care to make any further comment at this point, we will be very glad to accommodate you.

I think that all the members of the committee have had an opportunity.

Are there further questions?

Mr. WASHINGTON. Mr. Reynolds, isn't the bottom line that you disagree with race-conscious preferential hiring ordered by the courts? For example, in the *Weber* case you simply do not intend to follow it?

Mr. REYNOLDS. I would have to tell you that the *Weber* case is now the law. It would be improper and irresponsible for me to act in a way that is contrary to the law. I certainly am not suggesting to you that my intention is to ignore existing law.

Mr. WASHINGTON. What is your response to the *Weber* case which is law?

Mr. REYNOLDS. My response to the *Weber* case is twofold: One is that I do not believe that the *Weber* case controls by far the bulk of the employment discrimination cases that are handled by the Civil Rights Division in the Department of Justice.

The second response is that I do feel that the *Weber* case is one that is very narrowly drawn and whether in another instance the circumstances would be identical so as to require the same kind of approach, or whether a different approach would be required, certainly would depend on the facts at that time.

Mr. WASHINGTON. Your position is clearly going to have a chilling effect on a substantial number of people in this country. I daresay that minority groups and women will not look to the Justice Department for any help in terms of tying to resolve this knotty problem, which you admit has existed in this country for so long.

Mr. **Reynolds**. I do agree, it is a terribly difficult problem. I think we are trying to address the problem in the most responsible way that we can, and to resolve it in a way that is consistent with the norm of nondiscrimination that I believe is embedded in the Constitution and under title VII.

Mr. **Washington**. I submit to you that you are not doing that. I yield.

Mr. **Hawkins**. The committee will certainly be willing to help you in anyway to do what you say you want to do.

We certainly want to express our appreciation for your attendance this morning. While we may have sharp differences, if there are any areas which we can explore together or be of some assistance, the committee is looking for constructive remedies to use and will encourage the Department to do everything possible, particularly the Civil Rights Division, and we stand ready to cooperate certainly in the views that we have expressed, Mr. Reynolds.

Thank you very much.

That concludes this part of the hearing.

Mr. **Reynolds**. Thank you, Mr. Chairman.

Mr. **Hawkins**. The next witness is a distinguished member of the House and for the purposes of introducing her, I would like to call on Representative Patricia Schroeder, a friend of the committee, for that purpose.

Mrs. Schroeder, we will now call on you for the purpose of introducing our next witness.

STATEMENT OF HON. PATRICIA SCHROEDER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO; CO-CHAIR OF THE CONGRESSWOMEN'S CAUCUS

Mrs. **Schroeder**. Mr. Chairman, the gentlelady and myself are wondering about sex discrimination. They all left the room when we took the stand, but we will proceed.

I am here basically as the cochair of the Congresswomen's caucus to introduce someone who needs no introduction—Lindy Boggs.

I am here to put it in a framework and compliment the subcommittee. The Congresswomen's caucus works together with the black caucus on many affirmative action goals and rules.

I think we have all been a little frustrated in determining anything as action. You can call it glacial action. That is not exactly what I consider action, but I have a feeling we are moving more toward the glacial tendency than some of the others we would like to see.

The reason I want to especially compliment you is that I chair the Civil Service Subcommittee. We have been trying to get the EEOC in to testify before our committee as to what is happening on affirmative action.

Today, the acting chairman came in and said: "We have a terrible problem at EEOC. Of the five-member panel, there are only three, and one of those terms is up in October, which means we can't even do any business after October 1 unless there are some new appointments."

We know there is still no chairman of the EEOC. The Commission still has an Acting Chairman. All the emphasis appears and all the policy decisions appear to be made somewhere else. Obviously with a Commission panel that is not in place, without a new Chairman on board, and with a lot of budget cuts being targeted in this area, you begin to wonder if the EEOC is not a mere shadow of its former self.

In having those conferences with the EEOC, as we try to coax them in, what happened to affirmative action? Is there any left? Are we being too uppity to ask to do something about sexual harassment or affirmative action? I can't say how important these hearings are today because it appears that Justice is calling more of the shots than anyone else at the moment. They seem to be the ones who are plugged into the administration. So, I use my time to introduce Lindy and to compliment you, because I know Lindy has been working so hard on this. I think she has been a real tribute to the whole body. We know how hard she has worked on it.

We in the Congresswomen's caucus compliment you, and Lindy, we are proud of you.

Mr. HAWKINS. On behalf of the committee I welcome you and join with Mrs. Schroeder in the kind remarks she has made. They are certainly, I think, rather bland in a sense as to what could have been said, but she has done an excellent job.

I certainly want to personally join in the compliment to you. You represent a district and a State which is my native State and I am very proud that you say that I was born in the State, because of you, largely. There are some other reasons I would not want to deny, but certainly in your case it is a great tribute, I think, to your distinguished husband who was a very dear friend of mine, and I think you carry on the same tradition.

I welcome you before the committee.

Mrs. SCHROEDER. We really think of her as a national treasure, not as a State treasure.

Mr. HAWKINS. Now, you women may take over.

STATEMENT OF HON. LINDY (MRS. HALE) BOGGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA, ON BEHALF OF THE CONGRESSWOMEN'S CAUCUS

Mrs. BOGGS. Mr. Chairman, I think I should quit while I am ahead.

Mr. Chairman, I do thank you and all the members of the panel very much for allowing me to testify this morning; and I very much appreciate the beautiful introduction of my colleague, the cochair of the Congresswomen's caucus. With her, I would like to commend you for holding these hearings and making certain that there is some oversight on the various practices that we know are being changed and the new regulations that are being written.

Before I go into my testimony, I would simply like to comment on something that Mrs. Schroeder has said; namely, that the Department of Justice does seem to be geared up, even though the EEOC is not.

I would like to call to the attention of the committee the fact that the EEOC has a staff of 3,468. The staff of 3,468 pursues individual employment discrimination complaints and initiates investigations of companies suspected of past discrimination. It has been able to reduce the complaint backlog from 100,000 in 1977 to about 29,000 today. But the budget and staff restrictions recommended by OMB will delay elimination of this backlog to fiscal 1983 instead of a year earlier, according to the Acting Chairman of the EEOC, J. Clay Smith, Jr.

I do think we have to realize that as a result of budget cuts and staff cuts, even in the Justice Department area that reviews the Commission and the discriminatory practices throughout the country, the EEOC will be understaffed and will have fewer resources with which to pursue its goals.

But I am here for another purpose, of course, and that is to tell you that we are pleased that the Subcommittee on Employment Opportunities is fully reviewing the proposed changes in the equal employment and affirmative action regulations. We are committed to insuring that advances made by American women—all American women of every color, creed, and condition—will be continued as a result of these Federal policies.

I hope that our comments will be both informative and constructive.

The Congresswomen's caucus is aware that trying to attribute directly to affirmative action many of the gains that women have made in the past 16 years is extremely difficult. Nonetheless, we would like to highlight for the subcommittee several areas in which progress in the promotion of equal employment opportunity for women can be demonstrated.

At the American Telephone & Telegraph Co., a leader in the communications industry and the largest company in the world, women have made significant progress. As the result of an affirmative action consent decree, women in management positions at A.T. & T. rose from 22.4 percent of all managers in 1973 to 28.6 percent in 1978. Women in craft positions at A.T. & T. made up almost 10 percent of the total craftworker pool in 1978, up from less than 3 percent 6 years earlier.

Almost one-third of the Nation's bank managers are women, up from only 17.6 percent in 1970.

Women's participation in skilled trades increased by 80 percent during the seventies, an astounding gain, but we must remember that women had been virtually absent from the skilled trades before the Federal Government established its affirmative action policies.

My belief in the promise and effectiveness of affirmative action for women has been influenced greatly by the success of programs in our own State of Louisiana. In 1979, for example, the U.S. Department of Labor ranked Louisiana second in the Nation for the number of women participating in apprenticeship programs. In the same year, the Labor Department named Louisiana's preapprenticeship program in carpentry a national model program.

I would like to briefly share its success story with you, as an illustration of the fine cooperation that can be achieved among labor groups, private businesses, and the Federal Government in pursuit of affirmative action.

The preapprenticeship program in carpentry was initiated in 1978 in New Orleans, La., through the joint efforts of the Louisiana

Bureau for Women and carpenters' trade unions. The catalyst was affirmative action regulations established for contractors. The unions wanted qualified female workers to participate in Federal contract work. The women wanted to train for well-paying jobs. Both groups got what they sought.

Funded through the CETA program, women trained on the job with journeymen carpenters. They learned the technical skills necessary to pass union entrance tests and the physical skills required of them on the job. Of the female preapprentices, 100 percent in carpentry were placed after having completed the program. Still popular and effective, the preapprenticeship programs are continuing and a millwright program has been added.

Despite the general decline in the economy which has stifled the construction industry, over 60 percent of Louisiana's preapprenticeship graduates now find work.

The success story has additional significance for me because the city of New Orleans has been designated by the U.S. Department of Commerce as the site of the 1984 World Exposition. Newspaper ads recently solicited bids from women- and minority-owned firms for participation in construction of the fair's exhibition hall.

I feel sure that the female carpenters who were trained through the Louisiana's Women Bureau preapprenticeship program will be a great asset to the construction of this very important project a project that will bring economic well-being to private enterprises, businesses, suppliers and services throughout Louisiana.

This is just one example of the way affirmative action programs can work. The American economy rests on the law of supply and demand, and the success of the preapprenticeship program in carpentry demonstrates that women can be significant participants in the supply side of the economy. No longer can we assume that women are primarily consumers on the demand side.

The dramatic influx of women into the labor market during the seventies indicates that an increasing number of families need to supplement their incomes to overcome the ravages of inflation. Most women work not because of self-fulfillment needs, although this is certainly an honorable goal, but because they simply need the money for themselves and often for their families.

Mr. Chairman, as you may know, I serve as a member of the House Committee on Appropriations. Recently, the Appropriations Subcommittee on Military Construction reported out a bill which the full committee adopted. You will be most interested to learn that the committee provided $14,730,000 for the construction of child-care facilities, so that the wives of military personnel at 10 bases can find it easier to go to work.

The committee language states:

> The (Appropriations) Committee feels that child-care centers have become a necessary element of life in the working community and therefore, should be available to members of the Armed Services* * *

Research by the Congresswomen's Caucus has shown that the rapid changes in work roles now occurring show every indication of continuing into the eighties. Women's increased participation in the work force has become particularly noticeable because it has coincided with the labor force entry of young women born during the post-World War II baby boom. If these women, who will be 27 to 44 years old in 1990, continue to display a stronger attachment to the labor market than do their female elders—as well as a heightened desire to integrate their market jobs more harmoniously with their personal and family lives—then they will continue to revolutionize the ways in which families live.

The appropriation of funds for day-care facilities at military installations demonstrates that women are willing to adapt their lives so that they can continue to earn the salaries that provide the sole support of many households, help to pay the rent and grocery bills, and often combine with a spouse's income to hedge against inflation.

The Congresswomen's caucus would also like to call to mind some of our special concerns about proposed changes in affirmative action policies, so that you may consider them during your deliberations.

One, we suggest that the subcommittee carefully examine the increase in ceiling levels for the amount of contract awards requiring written affirmative action plans, in light of standard inflation adjustments for other small-business contracts.

Two, affirmative action regulations proposed by the Carter administration required companies with at least 50 employees, and having contracts worth $50,000, to submit a written affirmative action plan each year. The proposed revisions would raise the employment level to 250 employees, and the contract threshold to $1 million before a written plan is required.

Three, small companies, those with 100 or fewer employees, generate 80 percent of all new jobs in the United States. In light of the fact that 6 of every 10 new entrants to the work force are women, we ask the subcommittee to consider the effects of the proposed revisions on the employment of women nationwide.

Four, in 1980 the research arm of the Congresswomen's caucus completed a study on the economic issues facing older women. The study revealed that many aging women require employment for their economic survival. This refutes the popular thinking that most older people can anticipate adequate retirement income. Unfortunately, women retirees have often worked in jobs that carry lower pay, so their retirement income is lower as well.

The Congresswomen's caucus recommends that the subcommittee explore employment opportunities for older women, particularly for the age group of 50 to 59, a time during which many women are forced to financially support themselves for the first time. Affirmative action programs should also service more older female workers, with an emphasis on counseling and retraining which will enable them to secure employment.

Five, we also urge the subcommittee to consider the increasing need for skilled employees who will participate in upcoming construction of military weapon systems and in advanced technology programs such as the NASA space program. Women can contribute greatly to these national efforts if educated and trained properly, and their participation should be strongly advocated and promoted.

The entire Nation bears the cost of deliberate or unintended employment discrimination against women. The United States will not realize its full productive capacity until women are recognized as able-bodied, willing workers.

Single women continue to enter the work force at a great rate and should be trained and encouraged to enter occupations that will tap their talents properly and provide them with adequate income throughout their lives. Female heads of households, or wives who must supplement the family income, should not be allowed to remain in large numbers in low-paying, no-status jobs.

In closing, the Congresswomen's caucus firmly believes that the Federal Government's commitment to equal employment opportunity and affirmative action must be maintained strongly if we are to be a productive nation and if private businesses and labor are to cooperate in reaching this goal.

Thank you, Mr. Chairman.

Mr. HAWKINS. Thank you, Mrs. Boggs.

I don't have any questions, but let me reassure you, if necessary, that the special concerns that you expressed, beginning on page 4 and continuing on page 5 and the recommendations made, will certainly be given the full consideration of this subcommittee.

I also want to reassure you that whenever we speak of minorities or speak of women, we use the terms almost interchangeably in terms of the interest of this committee. I feel that the greatest amount of cooperation should be maintained because, obviously, what affects women also affects minorities and what affects minorities affects women as well. I think they are both being treated pretty much the same. At the same time it is almost benign neglect, if you can even call it that much.

We are certainly concerned with the other points raised in your statement. I want to congratulate you on a very meticulous and clear-cut presentation of the concerns of the Congresswomen's caucus.

Mr. Clay?

Mr. CLAY. Thank you, Mr. Chairman.

Let me also commend our colleague on her statement which was both informative and very clear.

For the record, I also would like to commend the other half of that dynamic duo, Mrs. Schroeder, for her contribution this morning.

I have one question: The preceding witness, Assistant Attorney General for the Civil Rights Division at the Department of Justice, said that the phrase "affirmative action" means different things to different people, ranging from simple diligence in insuring against discrimination to conscious favoritism of persons of one race or sex. Is that how you would describe "affirmative action"?

Mrs. BOGGS. I think "affirmative action" certainly means to me what the words imply, that you have an affirmative attitude and that the actions that insure from that attitude are affirmative in regard to the people that you are trying to protect and to help.

Mr. CLAY. Thank you.

Mr. HAWKINS. Mr. Washington?

Mr. WASHINGTON. I also very much appreciate your testimony, Mrs. Boggs. You heard the testimony of Mr. Reynolds, of course?

Mrs. BOGGS. Yes.

Mr. WASHINGTON. What is your response to his position, which he reiterated several times, that even where a pattern of discrimination was found to exist, he did not support and presumably the administration does not support, preferential, race-conscious or sex-conscious hiring to alleviate that pattern? What would be your response?

Mrs. BOGGS. Mr. Washington, I did not hear all of Mr. Reynolds' statement or testimony, but if indeed that is the intention of the administration, I think that we will regret it. I think that the attitude has been that affirmative action programs, nondiscriminatory actions, are more or less in the hands of the courts and the Executive, but I believe that you and your committee, Mr. Chairman, are saying that the Congress is not going to endorse the action of which we disapprove by simply allowing the executive and the courts to determine future actions, and that the reports of this committee and whatever ensues from it will certainly help to determine the actions of the executive and, hopefully, will see that the laws will be properly interpreted by the courts.

I don't think he could possibly have meant that they were not going to look at that backlog of cases that I mentioned earlier. It has been greatly reduced but there still is a tremendous number there. Even though the budget figures suggest that they will not be able to get to the backlog until 1983, instead of this year, they have said that they would get to them in 1983.

I hope, of course, that that can be accelerated. I trust that this committee and the Congress will be able to have some input into making certain that the legislation that we have passed is really in tandem with the Executive order. Often Executive orders have ensued from hearings in the Congress and often laws by the Congress have ensued to implement the Executive orders.

So, I would hope that this committee will be able to come forth with some recommendations that will insure that the executive branch continues to pursue affirmative action that has been expressed certainly since the Executive order of Lyndon Johnson in 1963.

Mr. WASHINGTON. If Mr. Reynolds and presumably the administation prevail, obviously minorities and women and particularly black women will suffer, because at the present time many black women are often the sole providers for their families and they suffer a double whammy, one being female and the other being black.

If Mr. Reynolds' position prevails, it will wreak havoc on many black women in our community. I will take your optimistic note and leave here with it.

Mr. HAWKINS. Again, Mrs. Boggs, thank you very much for your participation.

Mrs. BOGGS. Thank you, Mr. Chairman, and thank you for holding the hearing.

Mr. HAWKINS. By unanimous consent, if there is no objection, the brochure referred to, edited by Mr. James E. Jones, professor of law at the University of Wisconsin, will be included in the record this morning.

[The brochure submitted by Congressman Hawkins follows:]

International Labour Review, Vol. 120, No. 4, July-August 1981

"Reverse discrimination" in employment

Judicial treatment of affirmative action programmes in the United States

James E. JONES *

1. Introduction

The fundamental premise of this article is that the term "reverse discrimination" is a popular corruption which has emerged recently in American law, particularly in the law respecting equal employment opportunity, as a shorthand way of expressing adverse judgment on the validity of affirmative action, i.e. action specifically designed to improve the position of a particular group that has hitherto been disadvantaged.

To appreciate the recent popularity of the term, and its present use in American law, it is useful to consider briefly certain historical developments of a century ago accompanying the adoption of the Fourteenth Amendment to the Constitution of the United States[1] as well as the current legal status of affirmative action, principally but not exclusively in the equal employment arena. At the outset, it should be understood that this article discusses uses and meanings of these concepts as they have emerged in *law*. The major difficulty which obscures the modern debate is that the various parties proceed from differing premises—sometimes moral, philosophical or ideological, at other times practical or political, and at yet others historical, legal or constitutional—as often as not without identification of the premise adopted or recognition that these differences imply different conclusions.

Some of the recent literature refers specifically to "reverse discrimination", and in the years between the Supreme Court's *DeFunis* v. *Odegaard* case[2] and *Regents of the University of California* v. *Bakke*[3] there has been a plethora of books and articles on employment quotas and affirmative action, pro and con.[4] It is my impression, without counting heads, that the majority of the American intellectual community has been opposed to the idea of affirmative action. This may be because it was

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litigation concerning entry into the professional schools that brought the problem before the Supreme Court. The "elitist" employment categories see this as a threat to their particular preserves. Ostensibly, many of them accept a colour-blind ideal as the only morally correct one and view any threat to that concept as morally, legally and philosophically wrong. They generally ignore history to the contrary and assert that the notion of a world in which race is irrelevant is the only one that ought to be accepted in a democracy.

The ideals, hopes and fears of intellectuals and scholars are often reflected in the opinions of the courts and contribute to differences in rationales and outcomes in particular cases. The vacillation and lack of clarity in the multiplicity of opinions that emerge from the courts when these issues are considered reflect both the conflicts and the uncertainties involved.

2. A brief look at the historical background

To put the current controversy over reverse discrimination and affirmative action in proper perspective would require several volumes. It must suffice for this article to point out that concern with racial preferences is not new, though it has been dormant for almost a century.

Between 1863 and 1870 the Congress of the United States adopted a series of Acts giving special benefits to Blacks.[5] The most far-reaching were the so-called Freedmen's Bureau Acts, the chief of which, and the one on which there was most debate, was adopted in 1866. The arguments for and against the special legislation for Blacks were fully developed in the course of this debate, which coincided with the consideration and approval by Congress of the Fourteenth Amendment to the Constitution.

Legislative history supports the conclusion that the racial distinctions in these laws were clearly intentional. There was vigorous debate and opposition, and much of the legislation was passed not only over a vocal minority in Congress but over the vetoes of President Andrew Johnson. Some of the earlier bills were directed to "persons of African descent" or to "such persons as having once been slaves".[6] While the legislation also authorised aid to "refugees", the Bureau provided most assistance to Blacks alone.[7]

The most significant of the Freedmen's Bureau Acts was passed by the 39th Congress and vetoed by President Johnson. The Civil Rights Act of 1866 was also passed by Congress and vetoed, but Congress overrode that veto and enacted the measure into law in April of that year.[8] During the spring of 1866 the Fourteenth Amendment was formulated, passed by both Houses and submitted to the Secretary of State on 16 June 1866, and to the several states for ratification. While the Fourteenth Amendment was being debated in Congress, a second Freedmen's Bill was prepared—a compromise bill that both Houses approved in July. The President again vetoed the Bill but this time the veto was overridden and the Act was passed on 16 July 1866.[9]

The debates surrounding both the Reconstruction Era[10] legislation and the Fourteenth Amendment provide compelling evidence that one of the major purposes of the Amendment was to make clear that it was within the constitutional power of the Congress to enact the special legislation designed to aid former slaves.

In introducing the Amendment to the House, Congressman Stevens described its basic purpose as providing for the amelioration of the condition of the freedmen. Any fair reading of the legislative history strongly indicates that the 39th Congress was fully aware of the race-conscious remedies and limitations contained in the Freedmen's Bureau Act it had passed in February and July 1866. It is also inconceivable that the same Congress intended by its approval of the Amendment in June 1866 to invalidate and forbid remedies it had laboured so hard to pass.[11]

The fundamental principle involved in the Freedmen's Bureau legislation is constitutionally indistinguishable from modern-day affirmative action. Of course the contexts differ, as may opinions regarding the need for special efforts. That, however, raises issues of political judgment rather than of constitutional permissibility.

The debates surrounding the Freedmen's Bureau legislation between 1864 and 1870 leave no doubt that the principal issue in dispute was preferential treatment for Blacks. Since the proponents carried the day so many times, why, a hundred years later, are we still debating the constitutionality of special programmes for minorities? Part of the answer lies in the emasculation of the Reconstruction Era programmes, both in their practical application and by decisions of the US Supreme Court from the *Civil Rights Cases* of 1883 to *Plessy* v. *Ferguson* of 1896. These decisions eviscerated the Reconstruction laws and the constitutional amendments.[12]

The reverse discrimination debates of the past decade have, with minor modifications, reenacted those of a century ago. There are signs that legally the results will be the same. It is to be hoped that this time both the legal and the practical outcomes will be more lasting.

3. The corruption of a concept

The controversy over reverse discrimination did not become acrimonious until rather late in the modern civil rights revolution. One reason, in my opinion, lies in the fact that at first the civil rights revolution had little practical impact upon Whites. It was not until theoretical rights began to be exercised in practice that opposition developed on a large scale. As long as the Executive Order[13] programmes of presidents and governors were confined to the "jaw-bone phase"[14] and Title VII[15] litigation was concerned largely with procedural and conceptual issues, only limited attention was given to so-called reverse discrimination. However, once affirmative action began to take off[16] and the focus of Title VII litigation shifted to the adoption of affirmative action plans to remedy discrimination, entrenched interests were threatened. Employers, unions and innocent White employees were put at risk and attacks on the bona fides of affirmative action began in earnest. Allegations of reverse discrimination became a key element in such attacks.

The term "reverse discrimination" is of rather recent vintage in American law, particularly in the law on equal employment opportunity (EEO). With the aid of a computer we searched the recorded cases[17] and the earliest derivation of the term we discovered was in a dissent to a 1964 New York State court case, *Balaban* v. *Rubin.*[18] In this case the majority sustained the action of a school board in drawing boundaries with a view, among other things, to improving racial balance in the new school. The dissent asserted:

> This . . . is the reverse of anti-discrimination. The principle of anti-discrimination is that each person shall be treated without regard to race, religion or national origin. It is discrimination to admit a person because he is a Negro, Pole, Catholic, Anglo-Saxon, Jew, and so on. If persons can legally be admitted because they belong to any of these groups, then they can be excluded for the same reasons. Such a result would be contrary to the equal protection clause of the federal and state Constitution. . . .[19]

The rise and fall of "reverse discrimination" in EEO law

The earliest federal cases we discovered both concerned employment. In *Howard* v. *St. Louis-San Francisco Railroad Co.*,[20] a 1965 case brought under the Railway Labour Act and crowning a 40-year struggle by Black "train porters" to be classified, paid and promoted with full seniority as "brakemen", the Court said that to allow the Blacks to use their seniority as trainmen could result in White brakemen, junior to them in years of service, being ousted from their jobs. This the Court characterised as "a kind of discrimination in reverse".[21]

In *Quarles* v. *Philip Morris, Inc.*,[22] the first case under Title VII of the 1964 Civil Rights Act in which the term occurs, a number of principles emerged. First, the Court determined that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act was passed. Therefore it required that Negro employees who had seniority in race-segregated departments of the company be allowed to use all of it in competition with Whites for job vacancies and promotions anywhere in the plant. The Court held, however, that Congress did not require that Negroes discriminatorily denied employment be preferred over White employees with employment seniority: that would constitute "reverse discrimination".

One aspect of the *Quarles* case, the "effects or consequences" concept subsequently endorsed by the Supreme Court in *Griggs* v. *Duke Power*

Co.[23] and relating to the present effects of past discrimination, had a substantial impact upon the development of Title VII law. Ironically, the reverse discrimination line in *Quarles* was a "throw-away", having nothing to do with the case. It was repeated by the Court of Appeals of the Fifth Circuit in *Local 189, United Papermakers and Paperworkers* v. *United States*,[24] again as an example of what the law did not require. It was not a meaningful part of either decision, but it obviously provided a usable concept for future litigation. If complainants could show that a proposed action constituted reverse discrimination, arguably the action violated Title VII. It should be noted that *Local 189* and *Quarles* were decided very early in the development of Title VII law (in 1968 and 1969) when a statement by any authority was quickly seized on in the controversy over the direction the law should take.

"Reverse discrimination" was an analytical element in the *Quarles* case but not essential to the outcome. In *Franks* v. *Bowman*,[25] however, the relief requested for individuals discriminatorily refused employment was denied by the lower court as "fictional seniority", which under the *Quarles* and *Local 189* analysis was "reverse discrimination". The Supreme Court rejected this analysis as having no foundation in the law or its legislative history.

The next year, the Supreme Court rejected, or at least seriously restricted, the remaining contribution of those cases.[26] It concluded that seniority systems did not violate the law merely because they telescoped into the present past discriminatory hiring or placement practices. The contrary view had been expressed by eight courts of appeals in more than 30 decisions.[27] The Court also ruled that actions taken before the EEO Act was passed, though they would be in violation of the law if taken now, were beyond relief under this law.[28] So by 1977, when the reverse discrimination debate was in full swing, the legal basis of the concept had ironically been rejected by the highest court of the land.

Affirmative action makes its mark

Had it not been for the Executive Order programme in the field of equal employment opportunity, the debate over reverse discrimination would have died down after the Supreme Court decisions on seniority. The modern thrust into affirmative action begins with efforts to give meaning to that term as it was used in Executive Order 10925 of 1961[29] and continues today with the implementation of other Executive Orders.[30] A development that strengthened the Executive Order programme—and inevitably led to charges of reverse discrimination—was the introduction of the Philadelphia Plan by the Federal Government in the late 1960s.[31] Executive Orders already required government contracting agencies to write into their contracts specific clauses respecting fair employment practices, including a provision that the contractor would take affirmative action to ensure that job applicants are employed and are treated during employment without regard to race, colour, religion, sex or national origin.[32] In mid-1969 the Secretary of Labour issued an order setting out the conditions that construction contractors in the Philadelphia area would have to meet if they were to bid successfully for federally assisted contracts. These included specific goals and timetables for the employment of minority group members in six skilled crafts. The Government's action was challenged and, after losing in the federal district court, the plaintiffs took the case to the Court of Appeals of the Third Circuit.[33]

The complainants contended that the Philadelphia Plan was illegal and void for the following reasons:

(1) It is action by the Executive Branch not authorised by the Constitution or any statute and beyond executive power.

(2) It is inconsistent with Title VII of the Civil Rights Act of 1964.

(3) It is inconsistent with Title VI of the Civil Rights Act of 1964.

(4) It is inconsistent with the National Labour Relations Act.

(5) It is substantively inconsistent with and was not adopted in procedural accordance with Executive Order No. 11246.

(6) It violates due process because *(a)* it requires contradictory conduct impossible of consistent attainment; *(b)* it unreasonably requires contractors to undertake to remedy an evil for which the craft unions, not they, are responsible; *(c)* it arbitrarily... singles out the five-county Philadelphia area for discriminatory treatment without adequate basis in fact or law; and *(d)* it requires quota hiring in violation of the Fifth Amendment.

This was a very significant case for a number of reasons, the most notable being that it was one of the first challenges to the Executive Order and, if the Government had lost it, the entire affirmative action effort might have been aborted.

In addition to claiming a violation of the anti-preference provision of Title VII, the plaintiffs contended that the Philadelphia Plan violated the basic prohibition against discrimination by imposing racial quotas and violated the "due process" clause of the Fifth Amendment ("No person shall be... deprived of life, liberty or property without due process of law...") because a decision to hire Black employees necessarily involved a decision not to hire qualified White employees—in other words, reverse discrimination.

The Court rejected all of these contentions and sustained the Government's plan. Two years later in *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler*,[34] the First Circuit Court of Appeals, reviewing a similar affirmative action plan in construction but one with even more stringent requirement than the Philadelphia Plan, sustained the goals and timetables against allegations of illegal quotas and reverse discrimination.

These cases show that there are two contexts in which the colour-conscious quota issues have been consitutionally treated and upheld. The first is where courts, pursuant to a federal statute (including Title VII), have ordered remedial action for past discrimination. These cases are instances of remedy imposed after adjudication. Clearly this type of remedy is not novel.[35] The second context in which race has been recognised as a permissible criterion for employment is in affirmative action programmes, not as a result of adjudication of discrimination charges against specific defendants but as a matter of general policy and practice either by the executive, some other administrative agency, or the legislature. The Court of Appeals in the Philadelphia Plan case discussed above clearly recognised that the affirmative action covenant in the plans at issue was no different in kind from covenants specified in invitations to bid for contracts. It opined that the plan did not impose a punishment for past misconduct but rather exacted a covenant for present performance. The distinction between affirmative action programmes as undertakings required as a matter of general policy and affirmative action programmes as a remedy for adjudicated discrimination is significant. It is the difference between the tort, malicious injury concept and a public policy requirement directed towards changing a social condition.

Despite the failure of the Philadelphia Plan challenge, several attacks were launched against the Government's use of goals and timetables. In the overwhelming majority of cases the programmes were sustained, but the enemies of affirmative action did not desist, regardless of the growing list of defeats in the federal courts. Efforts in Congress to prohibit affirmative action requirements by attaching riders to the Labour Department's appropriations met with decisive defeat after extended discussions of the alleged horrors of employment quotas imposed by the Government.[36]

In addition to appropriation riders, when revisions of Title VII of the Civil Rights Act were being considered in 1972 attempts were made to enact specific legislation which would prohibit the use of quotas.[37] Not only did Congress reject these but it enacted section 718 of Title VII of the Civil Rights Act of 1972, which gives increased legislative validity to the affirmative action plans required under the Executive Orders.

These victories were followed by further developments of great significance to the reverse discrimination controversy. First, the Federal Government generalised the affirmative action requirement that had been validated in construction and applied goals and timetables to most other contractors.[38] Second, the US Congress incorporated the affirmative action idea with varying degrees of specificity into a large number of federal programmes. These included 10 programmes relating to educational benefits, a minority business enterprise programme, programmes to help elderly members of minority groups and provide domestic assistance to persons who do not speak English fluently, the State and Local Fiscal Assistance Act of 1972, as amended (the Revenue Sharing Act), and many others. Additionally, many state and local bodies have adopted comparable programmes so that it is doubtful whether anyone now knows the full extent of affirmative action obligations throughout the country.

4. DeFunis to Bakke: five more years of acrimonious debate (1974-79)

By 1974, then, there was an abundance of affirmative action programmes, and although they had won approval by a substantial number of federal courts the critical issue of the constitutionality of affirmative action had still not been addressed by the US Supreme Court.

The first major case to reach the highest court of any state was *DeFunis* v. *Odegaard.*[39]

Marco DeFunis, a White male, was denied admission to the University of Washington School of Law although more than 30 applicants with lower academic credentials, all members of minority groups, were admitted. DeFunis sued in the state court alleging he had been denied admission solely on the basis of race, contrary to equal protection of the laws. The trial court agreed and a divided Supreme Court of the State of Washington reversed. The United States Supreme Court granted *certiorari.*[40] Thirty briefs were filed in the Supreme Court addressing the multitude of complex constitutional issues, but the Court, sharply divided, ruled that the case was moot.

Heated debates over the underlying issues continued for the next five years. *Bakke* v. *Regents of the University of California*[41] not only provided fuel for the continuing debates, but offered the US Supreme Court another opportunity to enter the fray.[42] Unfortunately, the Supreme Court's disposition of the *Bakke* case did less to resolve the conflict than the deep division in the intellectual community deserved.

The *Bakke* case concerned a special programme for admitting minorities to the Medical School of the University of California at Davis. Sixteen of 100 slots in the entering class were specifically reserved for minority candidates who were, however, also eligible for the other 84. This was the process that Bakke, who had been turned down for admission several times, challenged as unconstitutional, as a violation of Title VI ("Non-discrimination in federally assisted programmes") of the Civil Rights Act of 1964, and as a violation of the Constitution of the State of California. The trial court in California found that the special programme operated as a racial quota because minority applicants were rated only against one another and the 16 places in the class of 100 were reserved for them. This, the court said, violated the federal Constitution, the state Constitution, and Title VI. However, the Court refused to order Bakke's admission because he failed to prove that without the special programme he would have been admitted to the Medical School.

On appeal, the Supreme Court of California held that the programme violated the equal protection clause of the Fourteenth Amendment of the federal Constitution because Bakke had been rejected on the basis of his race in favour of another who was less qualified as measured by the standards applied without regard to race. The Court ordered Bakke to be admitted to the Medical School and enjoined the University of California-Davis from considering the race of any applicant in its admission process.

The Supreme Court of the United States granted *certiorari* to consider the important constitutional questions raised. A record number of *amicus curiae* briefs were filed, and when the Court finally issued its decision, all sides claimed victory. One description of the outcome was that it was a 4-1-4 decision (the Supreme Court consists of nine justices). Four justices, Brennan, White, Marshall and Blackmun, fully accepted the Davis programme. They held that the Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages minorities have suffered by past racial injustice, at least when appropriate findings have been made by judicial, legislative or administrative bodies with competence to act in the areas concerned. Mr. Justice Powell joined the four by indicating that he was prepared to accept a system that takes race into account as *one factor* in selection, and he would approve even numerical goals where there had been a finding of prior illegal discrimination by a competent administrative or legislative agency. Four justices, Stevens, Stewart, Rehnquist and Burger, ruled that the university's programme was prohibited by Title VI of the Civil Rights Act of 1964 because the intent of Congress in that Act was that any such programme be colour-blind. Therefore it was unnecessary to take a position in this case on the constitutional issue of the use of race quotas to achieve a specific remedial effect.

The sum of the Supreme Court's treatment left much to be desired. Although there seemed to be five clear votes, a majority, for the proposition that under certain circumstances racial classification and actions based thereon would pass constitutional muster, with the shift of Justice Powell on one critical issue, there were five votes that said the Davis programme was illegal. At the very least five justices concluded that the racial classifications and the use of specific remedies were not *per se* unconstitutional. That four justices took refuge behind the will of Congress as manifested in Title VI left unresolved the question of their views on the constitutionality of the Congress's deciding to *require* or *permit* affirmative action. With such a cloud over the meaning of the *Bakke* case, the debate over the desirability and legality of affirmative action continued. One effect of the decision, at least as it affected education, was that the faint-hearted or the doubtful were moved to restrict affirmative action efforts. On the other side of the ledger, encouraged by a five-vote majority that race could be relevant, the more resolute proponents of affirmative action were moved to devote their attention to the specifics of their various programmes to ensure that they met Justice Powell's concerns. The Federal Government, which had supported the California-Davis programme before the Supreme Court, continued its posture that such programmes were constitutional.

While the world was waiting for the Supreme Court's disposition of the

Bakke case, the Fifth Circuit Court of Appeals issued an opinion in *Weber v. Kaiser Aluminium and Chemical Corp.*[43] The *Weber* case was a Title VII challenge to a voluntary affirmative action programme providing for a one-to-one ratio in selection for an on-the-job training programme for skilled craft jobs in Kaiser's Gramercy (Louisiana) plant. This plan, which formed part of the collective bargaining agreement between the company and its union, was adopted partly in order to comply with Executive Order 11246. The company previously had no training programmes and had hired its skilled craftsmen directly from the streets. The Court of Appeals ruled that the plan violated Title VII by discriminating against Whites since it had not been determined or shown that Kaiser was guilty of any past discrimination.

Observers viewed *Weber* as an opportunity for the Supreme Court to pronounce comprehensively on the issue of reverse discrimination. The Court of Appeals went out of its way to determine that even if the plan were in response to the Executive Order, the Order was invalid as it was in conflict with Title VII provisions that all preferences based on race violated the Act.

The Supreme Court in a 5-2 decision ruled that the plan was not prohibited by Title VII.[44] Mr. Justice Brennan for the majority of the Court reasoned that to interpret Title VII as prohibiting voluntary preferences of the kind agreed to by the parties in this case would be inconsistent with the clear concerns that Congress expressed in enacting the statute.[45] The majority opinion in the case is a rather curious one as it addresses only the validity of *voluntary* affirmative action plans in the context of Title VII. It is all the more curious because, although the incidents giving rise to the case occurred in 1974, no discussion appears in any of the opinions of the legislative history of Congress's 1972 amendments to the 1964 Act. The Court behaved as if Congress had shut up shop and never discussed the relationship between affirmative action and Title VII after its debates of 1964. It could be argued that, as thus discussed, the ruling offers stronger support of affirmative action than might otherwise have been the case. What it plainly establishes is that a private employer and a union, or an employer alone, can voluntarily act to eliminate manifest racial imbalance in traditionally segregated jobs where no official body—judicial, legislative or administrative—has established that there was discrimination by that employer. Such conduct does not violate Title VII.

Unfortunately, the Court missed the opportunity to address directly many of the critical issues which were raised in the lower court. While recognising the value of judicial restraint, one still wonders at the Court's reluctance to gasp the nettle. The affirmative action/reverse discrimination issue had plagued the country for a decade, particularly in employment. If ever a more wide-ranging opinion was justified, it was in the *Weber* case. And yet the Court once again spoke with uncertain voice and the debates continue.[46]

The scholarly law journals tend to lag a season behind the Supreme Court. There has been a modest amount of post-*Weber* comment and, no doubt, there is work in progress which will make its appearance next season. Meanwhile, before we have digested *Weber*, the Supreme Court decided *Fullilove* v. *Klutznick* on 2 July 1980.[47] This case may be the Supreme Court's fundamental contribution to disposing of the reverse discrimination issue but it would be too optimistic a reading of *Fullilove* to conclude that it will end the controversy. There were three opinions among the justices voting to sustain the programme under attack and two opinions among the three dissenting justices.

At issue was a constitutional challenge to the requirement in a congressional spending programme that, unless an administrative waiver is granted, 10 per cent of the federal funds granted for local public works projects must be used by state or local grantees to procure services or supplies from businesses owned and controlled by members of the statutorily defined minority group (this was the minority business enterprise programme mentioned earlier). There is no question that this is classification by racial or other minority criteria and that it provides a "preference" for members of the groups so defined. In the district court the validity of the programme was upheld in *Fullilove* v. *Kreps*.[48] The Court of Appeals of the Second Circuit affirmed, holding that even by the most exacting standards of review the programme passed constitutional muster;[49] considering the programme in the context of many years of governmental efforts to remedy past racial and ethnic discrimination, it was difficult to imagine any purpose for the programme other than to remedy such discrimination.

In the Supreme Court a plurality opinion written by Chief Justice Burger and joined by Justices White and Powell, after reviewing the legislative history and the administrative procedures relevant to the minority business enterprise programme, declared that: "A programme that employs racial or ethnic criteria, even in a remedial context, calls for close examination."[50] The Court noted that even Acts of Congress are not immune from scrutiny and that it must look closely to determine whether Congress had overstepped its constitutional power. The Court concluded that the objectives of the legislation were within the power of Congress, that the limited use of racial and ethnic criteria in the context presented was a constitutionally permissible means for achieving those objectives, and that the Act did not violate the equal protection component of the due process clause of the Fifth Amendment.

It rejected the contention that, even in a remedial context, Congress must be wholly colour-blind. With regard to the objection that the programme impermissibly deprived non-minority businesses of access to at least a portion of the government contracting opportunities generated by the Act (the reverse discrimination charge), the Court recognised that the objective of remedying historical impairment of access could have the effect of awarding elsewhere some contracts which would otherwise have been awarded to non-minority businesses that may themselves be innocent of any prior discriminatory acts. It noted that the failure of non-minority firms to receive certain contracts was an incidental consequence of the programme, not part of its objective. Similarly, it conceded that past impairment of access by minority firms to public contracting opportunities may have been an incidental consequence of "business as usual" by public contracting agencies and among prime contractors, but the Court concluded that it was not a constitutional defect in the programme that it might disappoint the expectations of non-minority firms. It declared: "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible."[51]

On the charge that the programme excluded certain groups, the Court noted that it was legitimate for the legislature to take one step at a time to remedy part of a broader problem. Congress had not sought to give select minority groups a preferred standing in the construction industry but to place them on a more equitable footing with respect to contracting opportunities.[52] Perhaps the most telling statement from the Burger plurality opinion was the following:

> Congress, after due consideration, perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity. In this effort, Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives; this especially is so in programmes where voluntary co-operation with remedial measures is induced by placing conditions on federal expenditure. That the programme may press the outer limits of congressional authority affords no basis for striking it down.... Petitioners have mounted a facial challenge to a programme developed by the politically responsive branches of government.... Congress must proceed only with programmes narrowly tailored to achieve its objectives, subject to continuing evaluation and reassessment; administration of programmes must be vigilant and flexible; and, when such a programme comes under judicial review, courts must be satisfied that the legislative objectives and projected administration give reasonable assurance that the programme will function within constitutional limitations.[53]

Mr. Justice Powell, although joining the opinion of the Chief Justice, also set forth his view separately for the purpose of applying the analysis of his opinion in the *Bakke* case. He stated with greater specificity what must be done if competent legislative or administrative bodies are to be successful in imposing race-conscious remedies.

Mr. Justice Marshall, joined by Justices Brennan and Blackmun, concurred in the judgment of the Court but wrote separate opinions for a particular purpose. Agreeing with their fellow justices that programmes which contain suspect classification are subject to strict scrutiny and can be justified only if furthering a compelling governmental purpose, and even then only if no less restrictive alternative is available, the Marshall group wrote to reinforce the position they took in *Bakke*, namely that principles outlawing the irrelevant or pernicious use of race are inapposite to racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past discrimination.

> Such classifications [they wrote] may disadvantage some Whites but Whites as a class lack the "traditional indicia of suspectness": the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoration process. Because the consideration of race is relevant to remedy the continuing effects of past racial discrimination, and because governmental programmes employing racial classifications for remedial purposes can be crafted to avoid stigmatisation, we conclude that such programmes should not be subjected to conventional "strict scrutiny"—scrutiny that is strict in theory but fatal in fact.[54]

Justices Rehnquist and Stewart joined in a dissent, the burden of which was that the Constitution is colour-blind and neither knows nor tolerates classes among citizens, and that on its face the provision at issue in this case denied equal protection of the law. Their sentiments were summarised as follows:

> The Fourteenth Amendment was adopted to ensure that every person must be treated equally by each state regardless of the colour of his skin. The Amendment promised to carry to its necessary conclusion a fundamental principle upon which this nation had been founded—that the law would honour no preference based on lineage. Tragically, the promise of 1868 was not immediately fulfilled, and decades passed before the states and the Federal Government were finally directed to eliminate detrimental classifications based on race. Today, the Court derails this achievement and places its imprimatur on the creation once again by government of privileges based on birth.[55]

In their view, under the Constitution, we may not practise racism even temporarily as an experiment.

Mr. Justice Stevens, who also dissented, seems to come down somewhere between the position of the Chief Justice and that of the Rehnquist/Stewart dissent. He was not convinced that the Constitution contains an absolute prohibition on classification by race, but he believed it is up to Congress to demonstrate that any unique statutory preference is justified by a relevant characteristic that is shared by members of the preferred class. In his opinion Congress failed to make that demonstration in the programmes under scrutiny and consequently failed to discharge its duty to govern impartially as required by the Constitution.[56]

Two things may be said about the impact of this decision on the continuing debate regarding reverse discrimination/affirmative action. The view that racial classifications *per se* violate the Constitution managed to garner only two votes (Stewart and Rehnquist). Marshall, Brennan, and Blackmun would have sustained even the *Bakke* programme and took a more flexible view of what governments may do. They found no constitutional impediment to this programme and will no doubt continue to approve efforts to remedy discrimination in this fashion. Burger, joined by White and Powell, gave clear indication that all future programmes using racial classifications are going to be scrutinised on a case-by-case basis. Add to Powell's recitation of the safeguards required by such programmes Stevens's unhappiness with the extent to which Congress complied with those requirements this time, we can anticipate continued assaults upon the principle of affirmative action under the guise of seeking review of specific programmes. The Supreme Court, it seems, rather than resolving the issue, has ensured that debate over it will be prolonged. The Burger plurality opinion is a very narrow approach which suggests trouble for other programmes which might not be able to fit into the structure established by the Public Works Employment Act of 1977 and the history of administration of the minority business enterprise programme.

On the plus side, it seems clear that all six of the majority believe deference is due to the legislature, as a coequal branch of government, and that resolution of the conflict more appropriately belongs in the political arena. Even the dissent of Stewart and Rehnquist points in that direction.

That the debate will be continued is guaranteed by the Supreme Court's docket for 1981.[57] If the position outlined in the Burger plurality opinion (and seemingly endorsed by Mr. Justice Stevens) prevails, we can anticipate a steady flow of cases seeking Supreme Court review until all of the issues have been addressed.

5. Conclusion

The term "reverse discrimination" is a corruption no matter in which sense it is used. If it is used to describe denial of a right or a benefit or an expectation to a White because Blacks or other minorities are being given preference, it is a corruption of the law. The Supreme Court has ruled (Mr. Justice Marshall for a unanimous Court) that Title VII of the Civil Rights Act of 1964 and the Reconstruction Era Civil Rights Act prohibit discrimination on grounds of race—White, Brown or Black.[58]

Whenever race or ethnic background is used as a distinguishing factor in programmes benefiting the members of groups so identified, such programmes are attacked as "reverse discrimination". Up to a point, the term is apt—that is, these programmes do identify the group, not for the purpose of stigmatising, excluding or abusing its members, but to ensure that they are included and helped. Thus it is true that this is the reverse of the purposes for which these groups were classified for so many years in the United States, and that the attention given them under modern affirmative action programmes is the reverse of the treatment they received in the past. But this is not what those who use the term "reverse discrimination" mean. What they mean is that their group risks losing some right, benefit or expectation while other groups receive or will receive special attention and that this is, or should be, illegal.

Acceptance by the courts or other governmental entities of the notion of "reverse discrimination" would put the country in an impossible position. The only feasible way to remedy the underparticipation of some groups (e.g. in employment) is to devise programmes specifically aimed at the members of these groups. For example, if underutilisation of women and Blacks is the problem, it would be patently idiotic to craft a remedial programme that ignored sex or race.

The social purpose of affirmative action programmes is to achieve a distribution throughout occupational and professional categories, or other life chances, that is appropriately representative of the diversity of our population generally. To achieve this objective, some individuals in an underutilised group will necessarily be "windfall" beneficiaries of altered, and hopefully improved, economic circumstances. Unfortunately, some individuals in other groups whose participation is average or above will—if opportunities are not unlimited—be unintentionally restricted or forced to lower their expectations. To label such programmes "reverse discrimination" is to determine legality and constitutionality through the use of undefined terminology.

Analysis of the use made in law of the term "reverse discrimination" easily reveals what is at issue. Discrimination is not defined in equal employment opportunity law; rather its meaning has emerged through judicial decisions. There is discrimination—invidious discrimination—which is not in violation of Title VII or of other civil rights legislation.[59] What the law has endeavoured to do is to determine which kinds of discrimination are *actionable*. The reverse discrimination lobby would have the law prohibit any *benign* conduct based on race, by government or by private parties compelled by government, because any such programme would exclude some group.

Is there no justification for governmental attention to the plight of minorities in modern America? Is there no evidence of racial underparticipation in the benefits of America? Mr. Justice Marshall in his separate opinion in the *Bakke* case summarised the modern condition:

> The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.... [There follow statistics demonstrating that Blacks are on average at a clear disadvantage in respect of life expectancy, infant mortality, income and employment.]
>
> The relationship between these figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavoured position of the Negro
>
> In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.[60]

Americans are great believers in statistics and there is no way that the figures cited by Mr. Justice Marshall can be explained as accidental. One can, of course, take refuge in the belief that Black Americans are genetically inferior and, coupling this view with a notion of social Darwinism, conclude that the minority population's participation rate is what that population deserves. Another approach, of course—and one seemingly acceptable to Mr. Justice Rehnquist and Mr. Justice Stewart—is that regardless of the country's history and any current conditions of imbalance, the Constitution requires colour-blindness, and any effort to deal with this problem that involves classification by race and specific attention to the group so classified violates constitutional principles.

There is substantial evidence that the representatives of the majority of Americans reject the Rehnquist-Stewart approach and, whether or not they reject the genetic inferiority view, they accept the obligation of society to do something about the severe imbalance. One of the difficulties with the political response over the past decade, as was also the case in the 1860s, has been that legislative bodies have felt it necessary to include other groups as well as Blacks in the special programmes to make them politically palatable. Thus we see attention also given to women, the Spanish-speaking, the Indians and the Aleuts. History documents that the impact of invidious discrimination in this country has been felt most cruelly and perniciously by Blacks, but neither political power nor moral persuasiveness has ever been great enough for programmes to be crafted solely for their benefit.

Despite the continuing attacks on affirmative action programmes in periodic court cases and in the legal and intellectual journals, these programmes have gained wide acceptance over the past ten to 12 years. There are so many federal programmes on the subject that no one seems to have an exact count; the estimate is that Congress has enacted some 60 to 80 such laws.[61] Nor is there any estimate of how many programmes have been enacted by states, cities and counties, through legislation or executive action, though evidence again indicates that the number is substantial.[62]

The shrill and persistent attacks on affirmative action as a concept apparently come from a well educated and well financed minority which has created an impression that more people object to the race-specific approach to a historical evil than is really the case. Yet it seems, at the time of this writing, that they have been less effective than some other interest groups. The proliferation of affirmative action programmes during the past decade strongly suggests that they have been accepted by the most democratic of our processes. Now the US Supreme Court has given qualified approval to affirmative action in the *Fullilove* case, so that at the very least there is no *per se* constitutional prohibition of race- or ethnic-specific programmes for the benefit of the protected classes. Both the *Fullilove* and *Bakke* cases make clear, however, that such programmes will be subject to searching review and must be crafted with due care if they are to avoid constitutional infirmity. Thus it seems likely that the 1980s will see continued litigation over them, as neither the anti- nor the pro-affirmative action forces are likely to give up easily.

The continued viability of affirmative action programmes in the field of job opportunities will also, of necessity, be heavily dependent upon the economic health of the country, as sharing the burdens of past discrimination is more acceptable when job opportunities are abundant. For this reason the future of affirmative action/reverse discrimination will now depend less on legal theories or philosophical ideals than on economic and political realities.

Notes

[1] This reads in part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[2] *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974).

[3] *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978).

[4] See, for example, N. Glazer: *Affirmative discrimination, ethnic inequality and public policy* (New York, Basic Books, 1975); J. Livingstone: *Fair game? Inequality and affirmative action* (San Francisco, W. H. Freeman, 1979); L. A. Sobel: *Quotas and affirmative action* (New York, Facts on File, 1980); and T. Sowell: *Affirmative action reconsidered: was it necessary in Academia?* (Washington, American Enterprise Institute for Public Policy Research, 1975).

[5] Several instances were cited in the *amicus curiae* brief of the NAACP (National Association for the Advancement of Coloured People) Legal Defence and Education Fund, Inc., in *Regents of the University of California*, op. cit., pp. 10-54, which discusses the legislative history of the Fourteenth Amendment and documents the race-conscious actions of the 39th Congress.

[6] *Congressional Globe*, 38th Congress, 1st Session (1864), p. 2801.

[7] Ibid., p. 2798.

[8] Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

[9] An Act to continue in force and to amend "An Act to establish a Bureau for the Relief of Freedmen and Refugees", ch. 200, 14 Stat. 177 (1866).

[10] The Reconstruction Era (1865-77) was the period during and after the Civil War in which attempts were made to solve the political, social and economic problems arising from the readmission to the Union of the 11 Confederate states that had seceded.

[11] NAACP brief, op. cit.; H. Flack: *The adoption of the Fourteenth Amendment* (Baltimore, Johns Hopkins Press, 1908); J. Ten Broek: *Equal under the law* (New York, Collier Books, 1965); and G. Bently: *A history of the Freedmen's Bureau* (Philadelphia, University of Philadelphia Press, 1955).

[12] J. Franklin: "History of racial segregation in the United States", in *Annals of the American Academy of Political and Social Science* (Philadelphia), Mar. 1956, pp. 1 ff.; and idem "Two worlds of race", in *Daedalus* (Boston), Fall 1965, pp. 899-920.

[13] Executive Orders are administrative decrees used by the President to implement certain policies without the need for full Congressional approval. However, should an Executive Order have financial implications, the Congress must give its acquiescence if the Order is to be fully implemented. The same applies, *mutatis mutandis*, to orders issued by state governors.

[14] J. Jones: "Federal contract compliance in Phase II: the dawning of the age of enforcement of equal employment obligations", in *Georgia Law Review* (Athens (Georgia)), Summer 1970, pp. 756 ff.

[15] Title VII ("Equal employment opportunity") of the Civil Rights Act of 1964 is reproduced in full in *Legislative Series* (Geneva, ILO), 1964-USA 1. For an analysis of this Title see J. L. Means: "Fair employment practices legislation and enforcement in the United States", in *International Labour Review*, Mar. 1966, pp. 237-242.

[16] See J. Jones: "The bugaboo of employment quotas", in *Wisconsin Law Review* (Madison (Wisconsin)), 1970, pp. 341 ff.

[17] Using Lexis, a computerised system for retrieving legal documents, we first requested all opinions containing the term "reverse discrimination" and then all those containing both "reverse" and "discrimination" or "discriminatory" within five words of each other. The second search recovered terms such as "discrimination in reverse" and "reverse racial discrimination".

At the federal level we found 221 opinions using "reverse discrimination" or a similar term. Fifty cases which did not concern employment discrimination were immediately discarded, and 60 more were found to be not relevant to the analysis. In another 19 cases the term "reverse discrimination" was merely a party's allegation that was not accepted by the court. In 25 cases the term was not relevant to the decision.

We studied most closely the remaining 67 in which "reverse discrimination" was a synonym for "unlawful". In 30 cases the court labelled the contested consent decree, or affirmative action or the desired relief "reverse discrimination" and struck it down. In 37 cases the court upheld the decree or programme or granted relief by announcing that it was not "reverse discrimination". (Note that these statistics concern the use of the term "reverse discrimination", but not the state of the law on affirmative action. In some instances, both trial and appellate court decisions in the same case are included. Also, some opinions on affirmative action do not discuss "reverse discrimination". Those cases do not appear in the statistics.)

After announcing the conclusion "reverse discrimination", the courts rarely reasoned further. If the target group received a preference, it was "reverse discrimination" and unlawful. One partial exception in the US Court of Appeals, Second Circuit, in *Kirkland* v. *New York State Dept. of Correctional Services*, 520 F.2d 420 (1975). The Kirkland test has two prongs: first, there must be a "clear-cut pattern of long continued and egregious racial discrimination" and second, the effects of the affirmative action must not fall on a small, identifiable group.

[18] *Balaban* v. *Rubin*, 14 N.Y. 2d 193, 199 N.E. 2d 375 (1964).

[19] 14 N.Y. 2d, p. 199, 199 N.E. 2d, p. 378.

[20] *Howard* v. *St. Louis-San Francisco Railroad Co.*, 244 F.Supp. 1008 (E.D. Mo. 1965).

[21] Ibid., p. 1012. The job of train porter was indistinguishable from brakeman except that Blacks who performed all of the duties that brakemen did had extra tasks including sweeping, general cleaning and helping passengers. For doing more work they received less pay. For the entire sordid story see *Howard* v. *Thompson*, 72 F.Supp.695, reversed 191 F.2d 442, affirmed sub nom. *Trainmen* v. *Howard*, 343 U.S. 768 (1952).

[22] *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968).

[23] *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). See also A. W. Blumrosen: "Strangers in paradise: *Griggs* v. *Duke Power Co.*, and the concept of employment discrimination", in *Michigan Law Review* (Ann Arbor (Michigan)), 1972-73, pp. 59 ff.

[24] *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[25] *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976).

[26] *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977).

[27] There are 11 United States courts of appeals in 10 circuits composed of three or more states and one circuit for the District of Columbia.

[28] *United Airlines, Inc.* v. *Evans*, 431 U.S. 553 (1977).

[29] Executive Order 10925, *Title 3 Code of Federal Regulations: 1959-1963 compilation* (Washington, 1964), pp. 448-454. See also Means, op. cit., pp. 220-221.

[30] Sex-based discrimination was prohibited by Executive Order 11375, *Title 3 Code of Federal Regulations: 1966-1970 compilation* (Washington, 1971), pp. 684-686. Enforcement was transferred from 11 separate compliance agencies to the Secretary of Labour by Executive Order 12086, *Title 3 Code of Federal Regulations: 1978 compilation* (Washington, 1979), pp. 230-234.

[31] See "The Philadelphia Plan: equal employment opportunity in the construction trades", in *Columbia Journal of Law and Social Problems* (New York), May 1970, pp. 187 ff.; F. Leithen: "Preferential treatment in the skilled building trades: an analysis of the Philadelphia Plan", in *Cornell Law Review* (Ithaca (New York)), 1970, Vol. 56, pp. 84 ff.; and Jones: "The bugaboo of employment quotas", op. cit.

[32] The prohibition of sex-based discrimination was added in 1967 by Executive Order 11375. See note 30.

[33] *Contractors' Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971).

[34] *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974).

[35] See *Rios v. Enterprise Association Steamfitters Local 638 of U.A.*, 501 F.2d 622 (2d Cir. 1974), p. 629, for a list of the eight circuit Courts of Appeals that approved the imposition of a quota remedy once discrimination was found.

[36] "The Philadelphia Plan: a study in the dynamics of executive power", in *University of Chicago Law Review* (Chicago), Summer 1972, pp. 723 ff.

[37] Ibid., pp. 747-757.

[38] Order No. 4, *Code of Federal Regulations* (Washington, 1979), Vol. 41, part 60-2, pp. 310 ff.

[39] *DeFunis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169 (1973).

[40] *Cert. granted*, 414 U.S. 1038 (1973).

[41] *Bakke v. Regents of the University of California*, 18 Cal.3d 34, 553 P.2d 1152 (1976).

[42] *Cert. granted*, 429 U.S. 1090 (1977).

[43] *Weber v. Kaiser Aluminium and Chemical Corp.*, 563 F.2d 216 (5th Cir. 1977).

[44] *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

[45] Justices Stewart, White, Marshall and Blackmun joined Brennan's opinion, with Justice Blackmun also filing a separate concurrence. Justices Burger and Rehnquist dissented. Justices Stevens and Powell did not take part in the case.

[46] See H. Edwards: "Affirmative action or reverse discrimination: the head and tail of Weber", in *Creighton Law Review* (Omaha (Nebraska)), 1980, Vol. 13, pp. 713 ff.; idem: "Preferential remedies and affirmative action in employment in the wake of Bakke", in *Washington University Law Quarterly* (St. Louis (Missouri)), 1979, No. 1, pp. 113 ff.; and "Some post-Bakke-and-Weber reflections on reverse discrimination", in *University of Richmond Law Review* (Richmond (Virginia)), 1980, Vol. 14, pp. 373 ff.

[47] *Fullilove v. Klutznick*, 100 S. Ct. 2758 (1980).

[48] *Fullilove v. Kreps*, 443 F.Supp. 253 (S.D.N.Y. 1977).

[49] *Fullilove v. Kreps*, 584 F.2d 600 (2d Cir. 1978).

[50] *Fullilove v. Klutznick*, op. cit., p. 2771.

[51] Ibid., pp. 2777-2778.

[52] Ibid., p. 2778.

[53] Ibid., pp. 2780-2781.

[54] Ibid., pp. 2795-2796.

[55] Ibid., p. 2802. The Fourteenth Amendment applies to the states. The Due Process Clause of the Fifth Amendment performs the office of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment in requiring the Federal Sovereign to act impartially.

[56] Ibid., pp. 2813-2814.

[57] The Court will hear one challenge to a state affirmative action programme, and two other challenges of city affirmative action programmes seek review.

[58] *MacDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

[59] See, for example, *International Brotherhood of Teamsters*, op. cit.; *United Airlines*, op. cit.; and *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

[60] *Regents of the University of California*, op. cit.: separate opinion of Justice Marshall, pp. 387 and 395-396.

[61] Telephone conversation with James D. Henry, Associate Solicitor of Labour for Civil Rights, US Department of Labour, 7 July 1980.

[62] The *Fair Employment Practice Manual* (Washington, Bureau of National Affairs), Vol. 8-8a (1981), reports 20 states and the District of Columbia as having taken some type of affirmative action initiative. Seven states have enacted statutes. Nineteen, including five that also have statutes, have acted by Executive Order or administrative rules.

Mr. **Hawkins**. I would like to remind the members and the public that the next hearing is tomorrow. We are meeting tomorrow morning in the same room, at 9 a.m. We will hear from Mr. Benjamin Hooks, executive director of the NAACP, and other distinguished public witnesses.

Mr. **Washington**. Mr. Chairman, in light of the fact that the Assistant Attorney General's statement came in late, would it be permissible to submit additional questions?

Mr. **Hawkins**. The Chair will be delighted to convey the questions. I had reminded the Assistant Attorney General this morning that the rules do provide that the statements should come in 24 hours in advance. We only received them this morning.

Ed Cooke of the staff did remain in the office last night for the purpose of receiving the statement, but it did not arrive. I think it is most unfortunate because we did not have time to analyze the statement. I wish we had more time to do so. I am quite sure the questions might have been a little more incisive.

Mr. **Washington**. Perhaps briefer.

Mr. **Clay**. I suggest, Mr. Chairman, affirmative action in the future be included in the suggestions to the Department.

Mr. **Hawkins**. I think that is reverse discrimination.

In any event, that concludes the hearing for today.

[Whereupon, at 11:30 a.m., the subcommittee was adjourned, to reconvene at 9 a.m., Thursday, September 24, 1981, in the same room.]

OVERSIGHT HEARINGS ON EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION

Part 1

THURSDAY, SEPTEMBER 24, 1981

House of Representatives,
Subcommittee on Employment Opportunities,
Committee on Education and Labor,
Washington, D.C.

The subcommittee met, pursuant to call, at 9:15 a.m., in room 2261, Rayburn House Office Building, Hon. Ted Weiss presiding.

Members present: Representatives Weiss, Washington, and Fenwick.

Staff present: Susan Grayson, staff director; Edmund D. Cooke, Jr., legislative associate; Terri P. Schroeder, staff assistant; and Edith Baum, minority counsel for labor.

Mr. Weiss. Good morning. The Subcommittee on Employment Opportunities will come to order.

The vagaries of traffic and travel being what they are we can't always adhere to the schedule that we set for ourselves as to the order of witnesses. Mr. Hooks has not yet arrived but I understand that Ms. Fleming is here and so I think that we will proceed.

Ms. Fleming, if you will approach the witness table. Usually our problems are the other way around. Let me welcome you at the outset on behalf of the committee and invite you to present your testimony in whatever fashion you deem most effective.

Without objection, your entire statement will be entered into the record.

[The prepared statement of Jane Fleming follows:]

Prepared Statement of Jane P. Fleming, Executive Director, Wider Opportunities for Women, Inc.

Mr. Chairman and members of the Committee: Wider Opportunities for Women applauds your decision to hold hearings on equal employment opportunity and affirmative action, and for providing a forum for a much-needed discussion of this important public policy issue. I appreciate the opportunity to discuss our experience and our concerns with you.

BACKGROUND ON WIDER OPPORTUNITIES FOR WOMEN, INC.

Wider Opportunities for Women, Inc. (known as WOW), is a 17 year-old independent, nonprofit organization which works to expand employment opportunities for women. Since 1964, WOW has provided direct services to women seeking assistance in entering or re-entering the job market. For the last 10 years, we have pioneered in developing employment programs for women in skilled, well-paid nontraditional occupations, in working with employers and unions to develop a partnership for effective hiring and promoting of women, and in serving as advocates for women in the development of federal employment policy.

This work has occurred in many forms. For 10 years, our Nontraditional Work Programs have offered hands-on skills training in a variety of skilled occupations, including construction. As a result, several years ago WOW became involved in a suit against the Department of Labor, *Adocates for Women* v. *Marshall*. The genesis of the suit was the lack of enforcement, by the Department of Labor, of Executive Order 11246, as amended by Executive Order 11375. One result of this suit was the establishment of nationwide goals and timetables for women in construction. They were established in April, 1978 for a three-year period. The goals are stated as a percentage of the total number of hours of work. Currently, they are applicable to the contractor's aggregate on-site construction work force, whether or not part of that work force is performing work on a federal or federally assisted construction contract or a subcontract. Goals for the utilization of women apply nationwide to all construction crafts. The goals and timetables for women were as follows: from April 1, 1978 to March 31, 1979—3.1 percent; from April 1, 1979 to March 31, 1980—5.0 percent; from April 1, 1980 to March 31, 1981—6.9 percent.

The goals are realistic numerical objectives in terms of the number of expected vacancies and the number of qualified applicants available. Thus, if through no fault of the contractor there are fewer vacancies than expected, he suffers no sanction since he is not expected to displace existing employees or to hire unneeded employees to meet his goal. Similarly, if the contractor has made every good faith effort to include women but has been unabled to do so insufficient numbers to meet his goal, he is not subject to any sanction. The female work-hours goals are one objective measure of a contractor's affirmative action success. But they were not meant to be the sole measure.

As a result of the above-mentioned suit, a five-year Department of Labor Monitoring Committee was established. The purpose of the Committee is to oversee the implementation of the regulations and to measure their effectiveness. This responsibility includes oversight of the goals and timetables for women in construction and in the apprenticeship programs, the outreach program and the enforcement efforts of the Department of Labor. I am an appointed member of this Committee. This fall we trust that the Committee will be convened by the Department of Labor for its fourth meeting.

In 1977, WOW established Women's Work Force, a national network of women's employment programs, to monitor the impact of public policy on women's employment, to serve as a communications vehicle for approximately 100 programs across the U.S., and to strengthen the efforts of local programs through national technical assistance services. Most of the programs affiliated with Women's Work Force provide skills assessment, job counseling support services, job development, and job placement services to women. Most focus on the needs of economically disadvantaged women and work to open up new well-paid opportunities in occupations formerly closed to women—the so-called "nontraditional" jobs.

THE WOW STUDY

Last year WOW received foundation funding to conduct a monitoring project to evaluate the extent to which women have obtained employment on federal and federally assisted construction projects. The Center for National Policy Review has assisted in this project. The purpose of the project was to determine the confluence of elements that create a successful utilization or an unsuccessful utilization—of women construction workers. The objectives of the project were: (1) to obtain information on the participation of women in construction projects subject to Executive Order 11246, as amended; (2) to identify problems encountered by women, women's training and support programs, contractors and the OFCCP in increasing women's participation in such projects; and (3) to identify the nature and extent of OFCCP enforcement and other activities which are designed to increase women's participation in covered construction projects.

Wider Opportunities for Women selected four locations as monitoring sites; these sites were Tucson, Arizona; Longview, Washington; Raleigh, North Carolina; and Louisville, Kentucky. The selection criteria included factors such as the presence of a construction trades training program for women, stable administration of the program, federal construction activity, monitoring experience, and geographical location, among other considerations. At each site in-depth interviews were conducted with women construction employees and applicants, women's training and support programs, contractors, union business agents, joint apprenticeship and training coordinators, BAT and OFCCP officials. Approximately 110 interviews were conducted during the project. In three of the four locations OFCCP compliance review files were examined to ascertain the degree of enforcement and compliance activities with respect to construction contractors and sex discrimination issues. Approximately 36 files were reviewed.

The data subdivides most readily into nine issues. The issues include: (1) goals and timetables; (2) access and availability; (3) paperwork; (4) workplace environment; (5) stereotypic attitudes; (6) OFCCP enforcement; (7) OFCCP complaints; (8) women's entry into the construction trades; and (9) positive and negative perceptions of male and female employees.

Now that the interviews are completed, the data is being analyzed and a final report is being produced. This report will be used as a vehicle to document and highlight the strengths and weaknesses identified in the implementation of the system to ensure that women are not discriminated against in the construction trades. Data collected by the interviews will be the basis of my testimony today.

OCCUPATIONAL SEGREGATION

I am here today to talk about the women who are breaking into the well-paid nontraditional, blue-collar jobs long monopolized by men, and what affirmative action means to those women. Although there are more than 44 million women in the paid labor force today, the majority are restricted to just 20 of the 420 listed occupational categories—mostly retail sales service, clerical, factory, or plant work. The growth of job opportunities in these traditionally female occupations has not kept pace with the growing number of female job seekers. As a result, women make up the majority (66 percent) of "discouraged" workers—those who have actually given up looking for paid employment. Of those women who found jobs in 1978, only 9.9 percent held well-paid traditionally "male" jobs; 21.6 percent held sex-neutral jobs; and 68.5 percent of the female work force was segregated into the low-paid, traditionally "female" jobs.

Most women work and need to work—in fact, women are the fastest growing part of the labor force. Women are entering the labor force because they and their families need the income. Yet the current wage differential between men and women is enormous; women earn 59 cents for every dollar earned by a man. To look for a moment at actual wages, one can see the impact of sex discrimination immediately. In a 1979 study on the median weekly wages of full-time workers, the Bureau of Labor Statistics reported that sales work (which has a traditionally female work force) generated $154 per week for female workers and $297 for male workers. This is frequently the case. Even in occupations which are predominantly female, men hold positions of greater responsibility, status, and financial reward. In the traditionally male occupations, the problem lies not only in the wage patterns, but in the barriers to the entrance of women. Because of affirmative action and pioneer efforts to train women for traditionally male fields in the last decade, the number of women in skilled trades increased by 80 percent. Yet this figure is based on the previous invisibility of women in these trades.

These gains are the direct result of the federal equal employment laws created in the 1960's to eliminate sex discrimination in the labor market. Among these laws was Executive Order 11246, as amended, by Executive Order 11375. These Executive Orders require covered contractors and subcontractors to ensure equal employment opportunity for women by eliminating discriminatory practices and by taking affirmative actions. Construction contractors and subcontractors working on federal or federally assisted construction projects are covered by these requirements. Through the Executive Order, the federal government endeavors to create an environment in which women seeking employment in the construction trades are assured of fair consideration without regard to their sex; by doing this, labor market imbalances created by past exclusionary practices are being rectified.

Since the issuance of the Executive Order, specific standards for the participation of minorities in the construction trades have existed. However, it was not until 1978 that the Department of Labor issued similar standards, including numerical goals and timetables, for the participation of women in construction. The Department made that decision because experience had shown that women seeking employment were not being given fair and equal consideration. In many cases both employers and unions were refusing even to consider women for these jobs.

Today I would like to discuss the three issues that the WOW study has established as vital to the continued elimination of occupational segregation by sex in the construction trades. The first issue is the need to focus resources on opening up access for women in skills training and construction employment opportunities. The second issue I will discuss is the demonstrated need for goals and timetables for women in construction. The third issue is the requirement of a vigorous OFCCP enforcement program. These are the three key issues which emerge from the WOW study. Each illustrates the extent to which the OFCCP, women workers, and women's programs must work in partnership to eliminate the long-standing occupational segregation that exists in the construction trades.

ACCESS, NOT AVAILABILITY, IS THE PROBLEM

The question of whether or not there are sufficient numbers of interested women to meet the goals has been the focus of a great deal of attention. This high level of attention was shown in the WOW study by the frequency with which contractors, unions, and joint apprenticeship and training committee coordinators raised this issue. The WOW study establishes that there are many more women interested in working in the construction trades than can obtain training or employment. Therefore, the "bottleneck" occurs in access to training or jobs, not in a lack of available women who are interested in participating.

Whether contractors, unions, and joint appreticeship and training committee coordinators do not know where or how to find women workers or, as the WOW study establishes, they simply are not attempting to discover women workers, there are numerous organizations and agencies that could assist them in meeting their goals. One obvious source is the training programs for economically disadvantaged women that are funded through public monies. These programs have placement goals that must be met as a prerequisite to continued funding. For example, one organization, beginning a pre-apprenticeship training program, held a meeting with area contractors and unions to find out how many job-ready women construction workers they would hire. The placement goals were then established on the basis of those commitments. When the women had completed the training, however, the program was unable to place one woman. These women had excellent entry-level skills, they were physically fit, but they were not hired, although male construction workers were being hired during this period. Due to their inability to place their clients, the program managers knew they would be forced to close, so they returned the money to the state. The issue here, as elsewhere, was not a lack of available women, but the inability of women workers to gain access to the construction trades.

GOALS AND TIMETABLES FOR WOMEN IN CONSTRUCTION

Since the goals and timetables for women in construction were first issued in 1978, there has been endless controversy about the possibility of meeting goals, the ramifications of not meeting the goals, and how future goals should be established. The new Administration has now added to the list of controversies the question of the continued existence of the goals.

Numerous objections to the goals for women in construction were raised by respondents interviewed in the WOW study. One objection focuses upon the unreasonableness of goals for the specific contractor or union workforce while agreeing to the need for goals in principle. One contractor said, "Goals may be necessary in some cases, but not in our case." Another contractor, who had no women in his workforce, maintained that "numercial goals are not necessary on our projects. I imagine on a lot of projects they would be necessary." A third contractor said that he believed goals were necessary: "Not for me but as a whole you're going to need that. I know two or three [contractors] who won't hire women until they're forced to." One example of this mixed perspective was enunciated by a contractor who drew the line for women workers between skilled or unskilled workers; he maintained goals are needed for unskilled trades, but not for skilled trades. The distinction between skilled and unskilled trades, and to which of the two categories women should gain access, is a persistnet theme throughout the study. Contractors, union officials, and coordinators are continuously making the decision about what women can and cannot do, with little or no communication with the women workers themselves.

A second objection to goals was that they were unattainable and therefore should be abolished. One contractor states, "I do not think a goal should be set because women are not available. Most women are not trained. If they wanted to work we would be over any goal set." Another contractor said, "Women aren't interested in construction." An OFCCP official agreed that there were not adequate numbers of skilled [emphasis added] women to meet the present goal. When asked why, the official replied that it was due to sex discrimination by the unions and in apprentice selection. A program operator maintained that they had no trouble recruiting interested women; she stated, "They have beaten the doors down ever since we opened; we turn away applicants." When asked if there were enough interested women to meet the goals, she responded, "Definitely." She was then asked why the goals were not being met. Her experience showed her that it was a combination of items which she listed as follows: high school and vocational education's failure to guide women into nontraditional careers: the apprenticeship system's failure to train qualified women; and discrimination by employers.

A third objection to goals was that contractors should be permitted to hire the best qualified worker available. One contractor maintained that goals were unnecessary and that contractors wouldn't/didn't follow goals anyway. "The labor market is such that the construction trades hire qualified persons regardless of race and sex. Numerical goals serve no purpose other than to burden companies with paperwork," A union business agent made a similar point when he said, "Government regulations aren't necessary in my union. All you have to do is a good job." One contractor who had never recruited or hired a woman stated, "My attitude is you have a person for a job whether they are male, female, black, yellow . . . I should have the right to hire who I want to."

A variant on the concern for hiring whoever is most qualified is the desire to hire whomever one pleases. One union official responded to goals by saying, "I'm not completely sold on goals. Pretty soon there will be no jobs left for average white [male] workers." In 1979, women were only 4 percent of painters, 3 percent of machinists, 2 percent of electricians, 2 percent of tool and die makers, 1 percent of plumbers, and 1 percent of auto mechanics.[1] Given these statistics, the union official's fear appears ungrounded.

An OFCCP administrator stated, "Around here contractors only hire men. It's like something out of Charles Dickens and the Dark Ages as far as consciousness." When asked why the resistance exists, the response was that women are an unknown commodity and meant trouble on the job because men do not want women working with them. The official added that this is demonstrated by contractors permitting harassment on the job so women will quit. Another contractor suggested that the government should not differentiate at all between workers, but should allow a volunteer system, the results of which are well understood—women are almost never considered for construction trades employment and rarely hired.

Many respondents were angry about the federal government's role in construction (even though the government is a major employer) as well as the fact of government requirements. The anger is apparent in the following quotes. A union business agent stated. "The government should keep its nose out of a lot of things. The goals are necessary or there wouldn't be any apprentices. But the government shouldn't be as involved in construction as it is." A contractor addressed a similar point: "The contractors in this town resent government requirements—they don't like having this matter shoved down their throats and will go out of their way not to comply." Another federal contractor objected to his lack of control over numerical goals set by the government. "The goal should be reduced because there's not enough women in my field to meet the goal. And because I don't have any control of the goals, I don't get involved--I'm not sure I can fill the need." As a result, this contractor made no effort to meet the goals for women.

Amid the vociferous negative reactions to goals for women in construction were positive reactions as well. One union official stated that "Numerical goals have been necessary in the past. It's the only way to get people to hire women. If we would do the right thing to begin with, government wouldn't have to make us." A contractor with $15 million in contracts and no women in his workforce said, "Goals are the one way. Contractors are not going to do it voluntarily."

Often respondents saw goals as a transitional and limited measure. As one union business agent said, "Numerical goals are necessary until contractors come to realize women can do the job." A contractor said the same thing: "Continue the goals and contractors will accept equal employment opportunity for women in construction." Another union official said, "Goals are necessary at this time, definitely. They need to be maintained. In six more years we should begin to see some results." The generally held conclusion was that goals must be enforced.

ENFORCEMENT BY OFCCP OF EXECUTIVE ORDER 11246 REGULATIONS

To the extent that the barriers of occupational segregation have begun to fall, there is a partnership effort underway. The combination is of determined women who want to obtain and retain jobs in the construction trades and the aggressive enforcement by OFCCP of Executive Order 11246, as amended. Without these two elements, occupational segregation will continue unhampered despite the current needs of women for increased access to high-paying, male-dominated occupations.

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[1] Newland, Kathleen; The Sisterhood of Man: Norton and Co., New York, 1979.

It is important to say at this point that we are not talking about forcing companies to seek out women who might want jobs. Instead we are talking about the enforcement of affirmative action laws that support women who are qualified for jobs but have been unable to obtain them. There are available, job-ready women, but they need access to the jobs. Enforcement of the affirmative action provisions of the Executive Order regulations can accomplish that. The workability of this partnership has been demonstrated most graphically in the coal industry. OFCCP's strong enforcement aided women who were attempting to obtain well-paid coal mining jobs. Betty Jean Hall, Director of the Coal Employment Project has data on the numbers of women who sought coal mining jobs when those jobs became available to women. Peabody Coal Company, by far the nation's largest coal producer, showed in its own affidavit that in Kentucky alone, the numbers of women applying for coal mining jobs increased as the word spread that the coal companies would have to hire women. The hiring occurred as follows:

In 1972, no women applied for mining jobs at Peabody in Kentucky;
In 1973, 15 women applied for mining jobs at Peabody in Kentucky;
In 1974, 94 women applied for mining jobs at Peabody in Kentucky;
In 1975, 291 women applied for mining jobs at Peabody in Kentucky;
In 1976, 297 women applied for mining jobs at Peabody in Kentucky;
In 1977, 720 women applied for mining jobs at Peabody in Kentucky;
In 1978, 1,131 women applied for mining jobs at Peabody in Kentucky.

These dramatic strides were made because of the effective enforcement of equal employment opportunity laws with affirmative action provisions. Without the effective enforcement of these laws, women cannot break the economic barriers of occupational segregation.

One often repeated complaint about OFCCP enforcement of the regulations is the paperwork burden. Contractors answered a series of questions concerning that issue. They were asked if they believed that the reporting or the application and recruitment data were unduly burdensome; if the contractor wold maintain similar records notwithstanding the regulations; if the data were not maintained how a good faith effort could be determined. The contractors were also asked to suggest alternatives to the reporting and paperwork requirements.

The contractor responses to the questions of whether the reporting and recordkeeping requirements are unduly burdensome were split 60 percent–40 percent. Approximately sixty percent responded that the requirements were not unduly burdensome.

Those who felt that the requirements were a fair burden made fewer additional comments. Two of those addendums were by way of suggestions to other contractors on how to ease the burden: "Set up a good system that makes it easier," and "the records are computerized so it's really not that much trouble."

Those contractors who stated that the requirements were unduly burdensome made a variety of explanatory comments. The most frequent refrain was the cost element. One respondent stated, "It costs me 50 percent of our corporate profits to fill out paperwork. That's junk that nobody ever uses." It should be noted for the record that the contractor who made that statement has over $1 million in contracts. Another response focusing on cost suggested the elimination of reports and recordkeeping and stated that those requirements were one reason why construction is so costly. A third contractor stated, "One person works for the government which increases our overhead and increases inflation."

Another subject of concern to the contractors who objected to the paperwork burden was the degree of benefit to either the government or to the contractor himself. One contractor succinctly stated his position, "It should be eliminated because it doesn't help me." Another contractor stated that "The reports don't do any good. The government doesn't do an adequate job of enforcing compliance." A third contractor spoke on the same subject. He advocated eliminating all recordkeeping requirements; he added as an explanation, "What the hell do you need them for? You either have women or you don't."

In answer to the question of whether the contractor would maintain records and data similar to that required by the government absent the requirement, most contractors said they would not.

When contractors stated they would like the recordkeeping requirements eliminated, they were asked how the OFCCP should determine good faith compliance with the regulations. Most contractors maintained that the recordkeeping requirements were the only workable system. One contractor stated, "I don't see any other way for them to do it, other than the way they are doing it now, which is probably the cheapest."

Several contractors had specific suggestions. One contractor suggested, "I would rather see OFCCP establish local coordinators with personal contact—someone I could talk to personally." Another contractor suggested a return to the pre-consolidation system of reporting to each agency for whom work is performed. One contractor responded in frustration. "I don't have any ideas. that's their problem, they solved it by dumping it off on us."

Summary

By way of summary, WOW wishes to express our alarm at the questions recently posed for public comment by OFCCP and opposition to the proposed OFCCP regulations. The very provisions which we see as vital for women to benefit from the Executive Order appear to be at risk. This is a time when equal employment opportunity laws are beginning to have an impact, and increased enforcement is vital to continue the gains women have achieved. Yet the Administration is severely curtailing the scope and the enforcement provisions of those regulations. WOW strongly suggests that the Executive Order program be strengthened. The four recommendations we suggest would accomplish that goal we urge your close attention to, and to the extent possible, implementation of, our four recommendations. The needs that underlie them were clearly established and illuminated by the data gathered in the WOW study. We recommend that:

1. OFCCP's presence with construction contractors be increased through improved enforcement of the Executive Order regulations;
2. OFCCP obtain direct jurisdiction over the construction trade unions;
3. Construction contractors increase women-targeted recruitment efforts, especially through the utilization of existing resources for women workers;
4. Successful enforcement of the Bureau of Apprenticeship and Training goal for women in registered training programs.

In closing, we wish to assure the Committee that the study's final report, available later this fall, will be distributed at that time to the entire Committee. As far as we know, the WOW Construction Contract Compliance Monitoring Project is unique. To our knowledge, it is the only study that documents the workings of affirmative action and equal employment opportunity beyond the parameters of a single program's or organization's experience. The WOW study has tried to document, compare, and make an objective assessment of this issue in several sites across the country. It is our hope that this pilot study will be recognized and used as an important piece of evidence—evidence establishing the need for continued equal employment opportunity laws with strong and effective affirmative action provisions.

STATEMENT OF JANE P. FLEMING, EXECUTIVE DIRECTOR, WIDER OPPORTUNITIES FOR WOMEN, INC., WASHINGTON, D.C., ACCOMPANIED BY LAURIE A. WESTLEY, COUNSEL

Ms. Fleming. Before I begin I would like to introduce Laurie Westley who is here with me. She is an attorney on our staff who has directed the study to which I will be testifying today and she will be able to answer technical questions about it.

Mr. Chairman and members of the committee:

Wider Opportunities for Women applauds your decision to hold hearings on equal employment opportunity and affirmative action, and for providing a forum for a much-needed discussion of this important public policy issue.

I appreciate the opportunity to discuss our experience and our concerns with you.

Background on Wider Opportunities for Women, Inc.:

Wider Opportunities for Women, Inc. [known as WOW], is a 17-year-old independent, nonprofit organization which works to expand employment opportunities for women.

Since 1964, WOW has provided direct services to women seeking assistance in entering or reentering the job market.

For the last 10 years, we have pioneered in developing employment programs for women in skilled, well-paid nontraditional occupations, in working with employers and unions to develop a partnership for effective hiring and promoting of women, and in serving as advocates for women in the development of Federal employment policy.

This work has occurred in many forms. For 10 years, our nontraditional work programs have offered hands-on-skills training in a variety of skilled occupations, including construction.

As a result, several years ago WOW became involved in a suit against the Department of Labor, *Advocates for Women* v. *Marshall.*

The genesis of the suit was the lack of enforcement, by the Department of Labor, of Executive Order 11246, as amended by Executive Order 11375.

One result of this suit was the establishment of nationwide goals and timetables for women in construction. They were established in April 1978 for a 3-year period. The goals are stated as a percentage of the total number of hours of work.

Currently, they are applicable to the contractor's aggregate onsite construction work force, whether or not part of that work force is performing work on a Federal or federally assisted construction contract or a subcontract.

Goals for the utilization of women apply nationwide to all construction crafts. The goals and timetables for women were as follows: from April 1, 1978 to March 31, 1979, 3.1 percent; from April 1, 1979 to March 31, 1980, 5 percent; and from April 1, 1980 to March 31, 1981, 6.9 percent.

The goals are realistic numerical objectives in terms of the number of expected vacancies and the number of qualified applicants available. Thus, if through no fault of the contractor there are fewer vacancies than expected, he suffers no sanction since he is not expected to displace existing employees or to hire unneeded employees to meet his goal.

Similarly, if the contractor has made every good faith effort to include women but has been unable to do so in sufficient numbers to meet his goal, he is not subject to any sanction. The female work-hours goals are one objective measure of a contractor's affirmative action success. But they were not meant to be the sole measure.

As a result of the above-mentioned suit, a 5-year Department of Labor monitoring committee was established. The purpose of the committee is to oversee the implementation of the regulations and to measure their effectiveness.

This responsibility includes oversight of the goals and timetables for women in construction and in the apprenticeship programs, the outreach program and the enforcement efforts of the Department of Labor.

I am an appointed member of this committee. This fall we trust that the committee will be convened by the Department of Labor for its fourth meeting.

In 1977, WOW established women's work force, a national network of women's employment programs, to monitor the impact of public policy on women's employment, to serve as a communications vehicle for approximately 100 programs across the United States, and to strengthen the efforts of local programs through national technical assistance services.

Most of the programs affiliated with women's work force provide skills assessment, job counseling support services, job development, and job placement services to women. Most focus on the needs of economically disadvantaged women and work to open up new well-paid opportunities in occupations formerly closed to women—the so-called "nontraditional" jobs.

These have included local employment programs, executive agency committees, landmark legal cases and congressional hearings and briefing sessions.

An expanded statement on WOW's activities is included in our written statement.

I would like now to move to the issue we are here to discuss today.

Last year WOW received foundation funding to conduct a monitoring project to evaluate the extent to which women have obtained employment on Federal and federally assisted construction projects.

The Center for National Policy Review has assisted in this project. The purpose of the project was to determine the confluence of elements that create a successful utilization or an unsuccessful utilization of women construction workers.

WOW selected four locations as monitoring sites; these sites were Tucson, Ariz.; Longview, Wash.; Raleigh, N.C.; and Louisville, Ky.

Approximately 110 interviews were conducted during the project. In three of the four locations OFCCP compliance review files were examined.

Occupational segregation:

I am here today to talk about the women who are breaking into the well-paid nontraditional, blue-collar jobs long monopolized by men, and what affirmative action means to those women.

I would like to discuss the three issues that the WOW study has established as vital to the continued elimination of occupational segregation by sex in the construction trades.

The first issue is the need to focus resources on opening up access for women to skills training and construction employment opportunities.

The second issue I will discuss is the demonstrated need for goals and timetables for women in construction.

The third issue is the requirement of a vigorous OFCCP enforcement program.

Each illustrates the extent to which the OFCCP, women workers, and women's programs must work in partnership to eliminate the long-standing occupational segregation that exists in the construction trades.

The WOW study establishes that there are many more women interested in working in the construction trades than can obtain training or employment. Therefore, the "bottleneck" occurs in access to training or jobs, not in a lack of available women who are interested in participating.

Whether contractors, unions, and joint apprenticeship and training committee coordinators do not know where or how to find women workers or, as the WOW study establishes, they simply are not attempting to discover women workers, there are numerous organizations and agencies that could assist them in meeting their goals.

One obvious, but overlooked, source is the training programs for economically disadvantaged women that are funded through public moneys. For example, one organization, beginnning a preapprenticeship training program, held a meeting with area contractors and unions to find out how many job-ready women construction workers they would hire.

The placement goals were then established on the basis of those commitments. When the women had completed the training, however, the program was unable to place one woman. These women had excellent entry-level skills, they were physically fit, but they were not hired, although male construction workers were being hired during this period.

The issue here, as elsewhere, was not a lack of available women, but the inability of women workers to gain access to the construction trades.

The second issue is the necessity for goals and timetables for women in construction.

One objection focuses upon the unreasonableness of goals for the specific contractor or union work force while agreeing to the need for goals in principle.

One contractor said, "Goals may be necessary in some cases, but not in our case."

Another contractor, who had no women in his work force, maintained that "numerical goals are not necessary on our projects. I imagine on a lot of projects they would be necessary."

A third contractor said that he believed goals were necessary: "Not for me but as a whole you are going to need that. I know two or three contractors who won't hire women until they are forced to."

A second objection to goals was that they were unattainable and therefore should be abolished. One contractor states, "I do not think a goal should be set because women are not available. Most women are not trained. If they wanted to work we would be over any goal set."

An OFCCP official agreed that there were not adequate numbers of skilled women to meet the present goal. When asked why, the official replied that it was due to sex discrimination by the unions and in apprentice selection.

A program operator maintained that they had no trouble recruiting interested women; she stated, "They have beaten the doors down ever since we opened; we turn away applicants." When asked if there were enough interested women to meet the goals, she responded, "Definitely."

A third objection to goals was that contractors should be permitted to hire the best qualified worker available. One contractor maintained that goals were unnecessary and that contractors wouldn't or didn't follow goals anyway. "The labor market is such that the construction trades hire qualified persons regardless of race and sex. Numerical goals serve no purpose other than to burden companies with paperwork."

One contractor who had never recruited or hired a woman stated, "I should have the right to hire who I want to."

A variant on the concern for hiring whoever is most qualified is the desire to hire whomever one pleases. One union official responded to goals by saying, "I am not completely sold on goals. Pretty soon there will be no jobs left for average white workers."

In 1979, women were only 4 percent of painters, 3 percent of machinists, 2 percent of electricians, 2 percent of tool and die makers, 1 percent of plumbers, and 1 percent of auto mechanics. Given these statistics, the union official's fear appears ungrounded.

An OFCCP administrator stated, "Around here contractors only hire men." When asked why the resistance exists, the response was that women are an unknown commodity and meant trouble on the job because men do not want women working with them. The official added that this is demonstrated by contractors permitting harassment on the job so women will quit.

Many respondents were angry about the Federal Government's role in construction. One contractor stated: "The contractors in this town resent Government requirements—they don't like having this matter shoved down their throats and will go out of their way not to comply."

It is important to note, however, that amid the vociferous negative reactions to goals for women in construction were positive reactions as well. One union official stated that "Numerical goals have been necessary in the past. It is the only way to get people to hire women. If we would do the right thing to begin with, Government wouldn't have to make us."

A contractor with $15 million in contracts and no women in his work force said, "Goals are the only way. Contractors are not going to do it voluntarily."

Often respondents saw goals as a transitional and limited measure. As one union business agent said, "Numerical goals are necessary until contractors come to realize women can do the job."

The generally held conclusion was that goals must be enforced, which brings me to the third issue: The necessity for enforcement by OFCCP of Executive Order 11246 regulations.

To the extent that the barriers of occupational segregation have begun to fall, there is a partnership effort underway. The combination is of determined women to want to obtain and retain jobs in the construction trades and the aggressive enforcement by OFCCP of Executive Order 11246, as amended.

It is important to say at this point that we are not talking about forcing companies to seek out women who might want jobs. Instead we are talking about the enforcement of affirmative action laws that support women who are qualified for jobs but have been unable to obtain them.

Betty Jean Hall, director of the coal employment project, has data on the numbers of women who sought coal mining jobs when those jobs became available to women.

Peabody Coal Company, by far the Nation's largest coal producer, showed in its own affidavit that in Kentucky alone, the numbers of women applying for coal mining jobs increased rapidly as the word spread that the coal companies would have to hire women. The hiring occurred as follows:

In 1972, no women applied for mining jobs at Peabody in Kentucky;

In 1973, 15 women applied for mining jobs at Peabody in Kentucky;

In 1974, 94 women applied for mining jobs at Peabody in Kentucky;

In 1975, 291 women applied for mining jobs at Peabody in Kentucky;

In 1976, 297 women applied for mining jobs at Peabody in Kentucky;

In 1977, 720 women applied for mining jobs at Peabody in Kentucky; and

In 1978, 1,131 women applied for mining jobs at Peabody in Kentucky.

These dramatic strides were made because of the effective enforcement of equal employment opportunity laws with affirmative action provisions. Without the effective enforcement of these laws, women cannot break the economic barriers of occupational segregation.

An often repeated complaint about enforcement of the regulations is the paperwork burden. Contractors answered a series of questions concerning that issue.

Their responses to the questions of whether the reporting and recordkeeping requirements are unduly burdensome were split 60-40 percent. Approximately 60 percent responded that the requirements were not unduly burdensome.

Those who felt that the requirements were a fair burden made fewer additional comments. Two of those addendums were by way of suggestions to other contractors on how to ease the burden.

Those contractors who stated that the requirements were unduly burdensome made a variety of explanatory comments. The most frequent refrain was the cost element.

It should be noted for the record that the contractor who said, "It costs me 50 percent of our corporate profits to fill out paperwork," has over $1 million in contracts.

Another subject of concern to the contractors who objected to the paperwork burden was the degree of benefit to either the Government or to the contractor himself. One contractor stated that, "The reports don't do any good. The Government doesn't do an adequate job of enforcing compliance."

When contractors stated they would like the recordkeeping requirements eliminated, they were asked how the OFCCP should determine good faith compliance with the regulations. Most contractors maintained that the recordkeeping requirements were the only workable system.

One contractor responded, "Documentation is the only way to determine." Another contractor stated, "I don't see any other way for them to do it."

By way of summary, WOW wishes to express our alarm at the questions recently posed for public comment by OFCCP and our opposition to the proposed OFCCP regulations.

The very provisions which we see as vital for women to benefit from the Executive order appear to be at risk. This is a time when equal employment opportunity laws are beginning to have an impact, and increased enforcement is vital to continue the gains women have achieved.

Yet, the administration is severely curtailing the scope and the enforcement provisions of those regulations. We strongly suggest that the Executive order program be strengthened.

The four recommendations we suggest would accomplish that goal. We urge your close attention to, and to the extent possible, implementation of, our four recommendations.

The needs that underlie them were clearly established and illuminated by the data gathered in the WOW study. We recommend that:

No. 1. OFCCP's presence with construction contractors be increased through improved enforcement of the Executive Order regulations;

No. 2. OFCCP obtain direct jurisdiction over the construction trade unions;

No. 3. Construction contractors increase women-targeted recruitment efforts, especially through the utilization of existing resources for women workers;

No. 4. Successful enforcement of the Bureau of Apprenticeship and Training goal for women in registered training programs.

In closing, we wish to assure the committee that the study's final report, available later this fall, will be distributed to the entire committee at that time.

As far as we know, the WOW construction contract compliance monitoring project is unique. To our knowledge, it is the only study that documents the workings of affirmative action and equal employment opportunity beyond the parameters of a single program's or organization's experience.

The WOW study has tried to document, compare, and make an objective assessment of this issue in several sites across the country.

It is our hope that this pilot study will be recognized and used as an important piece of evidence—evidence establishing the need for continued equal employment opportunity laws with strong and effective affirmative action provisions.

Mr. WEISS. Thank you very much. Ms. Westley, do you have anything to add at this point or will you just be available for questions?

Ms. WESTLEY. I will just be available for questions.

Mr. HAWKINS. Mr. Chairman, may I indicate for the record that because of a prior appointment I could not be present this morning for which I apologize to Ms. Fleming because I only heard part of the testimony.

Ms. Fleming, may I ask, first of all, whether or not you see a distinction between quotas on the one hand and goals and timetables on the other?

Ms. FLEMING. Yes, I do, and I think that we are talking about are goals and timetables, not rigid numerical so-called quotas.

Mr. HAWKINS. There are some witnesses who seem confused and tried to confuse the public, I suppose, as well as this committee, that there is no distinction between the two and try to make a case based on an argument against quotas. You do see a distinction.

May I ask whether or not you see any possibility of making any progress in the elimination of discrimination unless we do have some numerical goals set at least as a means of measuring whether or not we are complying or even making any progress?

Ms. FLEMING. I think it is essential and what our study has demonstrated, as you will see when you get the numerical data in the final report, is that while it has not been startling and dramatic there has been progress because of the goals and timetables.

Mr. HAWKINS. May I ask you again whether or not you believe that the administration's proposal, as contained in the proposed regulations to concentrate on individual complaints as a means of enforcement rather than dealing with class actions or with systematic discrimination, offers any particular advantage over the current system?

Ms. FLEMING. I think it means the end of real enforcement.

Mr. HAWKINS. Finally, in connection with your statement, you indicated that you made certain recommendations. You seemed to be suggesting there be increased enforcement within existing resources. In view of the fact that the President has already proposed and if Congress goes along with the proposal to cut back on the personnel as well as the funding for EEOC and OFCCP, that would certainly weaken the effectiveness of those agencies.

Isn't it a little idealistic for you to be recommending increased enforcement under the proposed regulations and with the cutbacks that have already been made?

Ms. FLEMING. Probably. We have to keep trying.

Mr. HAWKINS. Have you had any opportunity to present your views to the administration?

Ms. WESTLEY. Yes.

Ms. FLEMING. Yes, we have.

Mr. HAWKINS. Did you get any answers?

Ms. WESTLEY. They believe that they are increasing enforcement. They believe that they are only cutting unnecessary costs. It is a curious dichotomy and when one looks at the regulations I disagree, as many people in the civil rights community do disagree, but it is their perception or at least their public position that they are going to increase enforcement by making the cuts they are making.

If I may also enlarge on a few of the questions you have already asked. In terms of the goals, there was a suit brought that WOW was part of, the so-called *Advocates for Women* v. *Marshall* and it was a suit against the Department of Labor for the lack of enforcement of the Executive order to benefit women.

One of the results of that suit was goals and timetables for women. It was only after goals were established that there was any effort at all to recruit and hire women. Prior to that women were not even considered for construction trade employment.

The other point I would like to make is that I think the coal employment figures are the perfect evidence of the need for a systematic approach to enforcement. When the coal employment project approached OFCCP concerning its problem of not knowing where the specific women were who would be interested in coal employment but knowing that they did exist, OFCCP was the only agency that could help them because it could take that systematic approach, and it was very successful as the figures document.

Mr. **Hawkins**. Certainly I guess it buttresses the position I seem to see as one individual. I am surprised at the calmness of those of us who fought for these things through Democratic and Republican administration's since the Roosevelt administration.

This committee has not had any indication that anybody has become angry as yet. But we see what is happening today as you, along with many others, begin to raise your objections. Yet I am surprised at the calmness with which individuals accept it, as if statements made by the administration are true when we know they are not true. We allow national leaders to express themselves on the media with very false statements. I could be much stronger in my language but I won't—and yet there is such indifference, a lack of feeling in those who know what is happening and who know what the results are going to be.

Those who represent minorities and women and other groups who are going to be adversely affected—and eventually all society—and yet we seem to be accepting these things just as we accept budget cuts and nobody yet has, in my opinion, been strong enough in opposing these things.

Groups in the Congress are doing it but those who oppose them are labeled along with the rest of the individuals. No distinction is made. That, I think, is a sad commentary on our democracy. This is not a lecture to you, certainly it is not intended to be, but the fact that we can discuss these things and make recommendations that we know are not going to be accepted and know the results, it seems to me we have to express ourselves and get others to express themselves much more strongly than we are now if we want to save democracy and our institutions and if we want to make any progress.

Ms. **Fleming**. May I respond?

Mr. **Hawkins**. Certainly.

Ms. **Fleming**. In our work with many other groups across the country, one of the things that is really apparent is that most people have not yet realized the full extent of the administration proposals which will dismantle the equal opportunity protections that have been established.

The media has not put it together. It has been a very piecemeal reporting, if at all, I would hope that would be one thing that could come out of these hearings, a strong report that shows the whole picture.

Mr. **Hawkins**. Thank you. I certainly want to express appreciation to you and to the Wider Opportunities for Women and also at this time to express appreciation to our acting chairman today, Mr. Weiss of New York, who was here to diligently pursue these hearings when I was called away and certainly express my appreciation to him.

Mr. **Weiss**. Thank you, Mr. Chairman.

Mrs. Fenwick.

Mrs. **Fenwick**. Thank you, Mr. Chairman.

I am fascinated that your emphasis is so much on the construction trades and mining. That happens to be something I know a little about. I was surprised to hear our distinguished chairman say this had been worked since the Roosevelt administration.

I can only speak of the result I found in 1961 which was absolutely zero. We had in the State of New Jersey, Bureau of Apprenticeship, over 4,700 apprenticeships of whom 14 were nonwhite, and none was a woman.

I worked very hard and found six promising young black apprentices who were desirous of entering the electrical union, and finally at 1 o'clock in the morning after one hot summer night on Springfield Avenue in Newark, I was told in no uncertain terms those apprenticeships were saved for the sons of members and perhaps the sons of friends of members but certainly not for my six hopeful young men.

This was the situation after the long period of work which we have heard described here.

I see that you have as No. 2 of your goals to obtain direct jurisdiction over the construction trade unions. I wonder if your organization realizes the difficulty of such a thing?

Ms. **Fleming**. Yes, we do; we work with both contractors and unions in our own programs.

Mrs. **Fenwick**. Finally, I persuaded the Commission on Civil Rights to come into New Jersey, to Newark, to investigate this, and I will never forget the business agent who testified and said, quite frankly, that he never had a black as a member of the union.

I think there has been some change. This was before I was in politics and this was not a political exercise on my part. I am amazed to learn about the number of women applying for the jobs in the mines.

What could be more convincing? You start with 15 and wind up with 1,000 in such a short time.

Ms **Fleming**. The same thing happened in Seattle when the goals were established, I believe, at the work force parity and everybody said it was impossible. The same thing happened in the Maritime Administration in Pascagoula, Miss., where they said they would never get women but they established goals anyhow.

Mrs. **Fenwick**. That isn't unionized. Did you have trouble there?

Ms. **Fleming**. We were not working there but this was the experience of the Maritime Administration and in short order they had vast numbers of women applying.

Mrs. **Fenwick**. Many of the skilled trades, of course, are not unionized. For example, in my hometown there was one person who wanted to be a carpenter and had done 3 years apprenticeship with a carpenter who was nonunion, thinking that would serve as an apprenticeship. He was told to go to the neighboring town and sign up as a mason; because he was Italian, they didn't want him in the union for carpenters which had very few people of Italian origin.

So we had ethnic groups dividing not just black and white, and male from female, but German-origin Americans or Anglo-Americans from Italo-Americans. This is a very curious setup in the whole union field.

I wondered if you had had experience and perhaps more difficulty in the nonunionized area. After all, if there is a union you can talk to a specific person who is the business agent and who is responsible. Did you have more trouble with unionized or nonunionized contractors?

Ms. **Fleming**. I don't really know the answer to that.

Ms. **Westley**. With the unions there are two hurdles to be jumped. One is the union hurdle either access to the apprenticeship training program or the business agent and then the contractor hurdle—the contractor actually accepting the woman into the workplace, in other words.

In nonunion there is only one. You only have to deal with the contractor. Since unions are not directly covered under the OFCCP or under the Executive order, there is no real enforcement technique that OFCCP can use.

The way that unions are covered is that contractors are supposed to report unions that are not referring sufficient numbers of women to OFCCP. If you understand the construction trades, one realizes quickly it is not in the contractor's interest to do that.

Mrs. **Fenwick**. Then that is what you meant by section 2 to obtain direct jurisdiction over the construction trade. Of course that would be a key thing if you are going to move into the highest skilled trades.

Ms. **Westley**. Yes.

Mrs. **Fenwick**. So you would suggest then the law be extended to give jurisdiction and goals for unions as well as for contractors. Is that the point?

Ms. **Westley**. Yes; the jurisdiction be extended, yes.

Mrs. **Fenwick**. Thank you, Mr. Chairman.

Mr. **Weiss**. Mr. Washington.

Mr. **Washington**. Thank you, Mr. Chairman.

I want to thank you, Ms. Fleming, for sharing with us the results of WOW's study. I find it very helpful.

I share the chairman's concern about the lack of clamor in opposition to what is going on in this administration relative to the whole concept of affirmative action.

Mr. Reynolds, in charge of the Civil Rights Division in the Justice Department, yesterday took the rather blunderous approach to this whole business and labeled this whole process as reverse discrimination.

How do you respond to that charge? What do you say about that catchword which seems to frighten a lot of people?

Ms. **Fleming**. I think it falsifies the issue completely. What we are trying to do in the first place—white males have been discriminating for centuries, and what we are trying to do is redress the balance so there is equal opportunity for everybody.

Mr. **Washington**. Would it be more apt instead of saying reverse discrimination to call it sort of shared discrimination?

Ms. **Fleming**. The French, who have established an affirmative action system modeled somewhat on ours, call it positive discrimination.

Mr. **Washington**. We have to get some words to replace "reverse" because it does frighten people. It does conjure up that sort of thing.

I have no more questions.

Mr. **Weiss**. Mrs. Fenwick had asked a question I think you started to respond to and then you were diverted. That was the response of the construction unions to the effort to try to get them more directly involved in jurisdiction.

Do you want to complete that response as to what experience you had with them?

Ms. FLEMING. With the unions?

Mr. WEISS. Yes.

Ms. FLEMING. I think maybe I could best answer that by talking about our own specific program experience with contractors and unions where we began about 4 years ago.

We have done nontraditional training for 10 years but not in construction until about 4 years ago when we finally persuaded the carpenters' and the electricians' unions to begin working with us.

After about 2 years when they decided that it was a fruitful relationship and that we didn't have horns and were not going to sue them, they began to help us connect with other unions and then finally with the Building Trades Council.

Now we are working with about six trades. They provide the training. The journeymen who train our women are also committed to helping them in the placement of jobs and into apprenticeships.

Actually, though, the key to it all, both in our own specific programs and under the regulations, is the contractors who hire, because without the jobs, the union question is irrelevant.

Under the regulations there can be leverage on the unions because contractors go to the unions for and can request women and if they don't get any women, then they can look for women outside on their own.

That is pretty powerful leverage if they want to use it.

Mr. WEISS. Did your study involve only people who had Federal contracts?

Ms. FLEMING. Yes.

Mr. WEISS. You were in four different locations?

Ms. FLEMING. Yes.

Mr. WEISS. How many companies, how many individuals were the subject of your interview?

Ms. WESTLEY. We interviewed six contractors in each location, six unions, three joint apprenticeship councils, six women employees, two or three women's programs, OFCCP, and the Bureau of Apprenticeship and Training.

We also looked at 12 compliance review files which are the OFCCP documentation or review of contractors' work forces to see if in fact the regulations are being enforced or complied with in all except for one location where we could not obtain access to the files.

Mr. WEISS. Do you have any estimate as to what the situation is in those areas where there are no Federal contracts involved, in just the general industry itself as far as the hiring of women is concerned?

Ms. WESTLEY. That was specifically addressed in one of the interviews with a program director. This is not a women's training program but a leap program that does recruitment and outreach and is a placement vehicle.

She specifically said that one of the problems with goals is that they only covered Federal contractors and it is only Federal contractors who ever contact them for women, and that she wishes that all contractors were somehow brought under the same regulations.

Mr. WEISS. Go ahead.

Ms. WESTLEY. Her point would be that non-Federal contractors do not hire women at all.

Mr. WEISS. Is it fair to assume in your testimony today that if in fact the Federal Government now withdraws from enforcement of its own regulation and equal oportunity laws we have adopted, all efforts to bring women into the work force in the areas you have discussed, will in fact come to a halt or be seriously impaired?

Ms. WESTLEY. I think they would come to a halt and I think there will be the absolute elimination of women in the nontraditional fields.

Ms. FLEMING. The other side of that coin is the severe cuts in CETA which provides the funding for the programs that train women in these skills so it is the supply side.

Mr. WEISS. Do you feel your organization, or any other organizations, or the individual women who might be affected will have the resources to in fact follow through on generating individual legal action either on their own or through the efforts of the Justice Department?

Ms. FLEMING. Most of these women are low-income women who do not have that kind of resource.

Ms. WESTLEY. They also do not understand the system well enough to participate in it on that level. Women who are working in nontraditional jobs understand the tenuousness of their own positions and to bring a lawsuit when they live in a particular location and are going to have to deal again and again with the same small universe of contractors is very difficult for them.

In the study most of the women that we interviewed had been sexually harassed, yet only two chose any kind of formal working through of that problem. One was sufficiently discouraged by an EEO counselor that she never pursued a normal complaint. This other did and has been out of work now for 3 months.

Ms. FLEMING. I was going to make the same point.

Mr. WEISS. So that again the thrust of your testimony is that either the Federal Government continues to exercise its responsibility or nobody is going to be enforcing the effort.

Ms. FLEMING. It is a systematic problem, not an individual problem.

Mr. WEISS. Thank you very much.

I think it has been very important and valuable testimony and we look forward to receiving the full copy of your report.

Mr. WEISS. Our first scheduled witness, Mr. Benjamin Hooks, if you will approach the table I think we can proceed at this point. Again I want to welcome you on behalf of the committee and to express our understanding that given the vagaries of travel and traffic, meeting schedules these days is even more difficult than ever.

We have a full statement that will be, without objection, entered into the record. You proceed as you see appropriate.

[The prepared statement of Benjamin Hooks follows:]

PREPARED STATEMENT OF BENJAMIN L. HOOKS, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Mr. Chairman and members of this Subcommittee, I am Benjamin L. Hooks, Executive Director of the National Association for the Advancement of Colored People (NAACP).

Accompanying me today is Althea T. L. Simmons, Director of our Washington Bureau. I appreciate this opportunity to appear before you on behalf of the more than 1800 local branches, state conferences, youth and college units of the Association, to voice our wholehearted support for the continued use of affirmative action to achieve parity within the American labor force and educational institutions.

Affirmative action—the taking of positive steps to seek out and include qualified blacks, hispanics, women and other victims of systemic invidious discrimination in the ranks of previously segregated areas of public life, has proven to be the only effective means of mitigating the present effects of years of discrimination in employment and educational institutions.

Affirmative action as a public policy has been in existence since the 1960's. It became our nation's pronounced policy of attempting to erase the present effects of past discrimination at a time when our country had before it overwhelming evidence that blacks, Hispanics, and women remained underrepresented in the nation's educational institutions and underutilized in technical and skilled professions, despite previous efforts undertaken to redress these inequities. It was determined that past efforts to make whole the victims of invidious discrimination, which included policies of "nondiscrimination", were insufficient to erase the incidence and depth of inequality which remained manifest. More than neutrality was needed to achieve parity. As blacks had for years been deliberately and systematically excluded from the American mainstream because of their color, their inclusion would likewise have to be deliberate, systematic and race-conscious. What was needed and what is demanded is positive action to either promote opportunities to qualified members of the victimized class, or to enable members of this class to become qualified where they are not. Such action is the only way America can realize its aim of achieving a desegregated society after hundreds of years of segregation—the only means of redressing the bias contingencies in the direction of equality. No less is sufficient to overcome the residue of institutional discrimination.

The intended beneficiaries of affirmative action are the victims of past and present discrimination. The theory supporting the concept of affirmative action is the benign treatment of blacks, Hispanics and women, after generations of exclusion from the mainstream of American Society.

The constitutionality of affirmative measures to recruit, employ, and promote members of the protected class, is now well settled. On three occasions in recent years, the Supreme Court upheld the constitutionality of affirmative action. In *Regents of the University of California* v. *Bakke* the, Court affirmed the constitutional power of federal and state governments to act affirmatively to remedy disadvantages cast on a group by past racial prejudice. The Court went further and concluded that race can be used as a factor in shaping the affirmative remedy. In *United Steel Workers of America* v. *Weber*, the Court concluded that private employers and unions may voluntarily agree upon a bona fide affirmative action plan that takes race into account for the purpose of eliminating manifested racial imbalances in traditionally segregated job categories. Most recently, in *Fullilove* v. *Klutznick*, by a vote of 6 to 3, the Court approved the 10 percent minority business enterprise (MBE) provision contained in the 1977 Public Works Employment Act.

Despite the high court's clear and consistent holding that affirmative action plans which take race into account and impose numerical goals and timetables do not offend the constitution, affirmative action is once again on trial. Some are still arguing that affirmative action is repugnant to the constitution—"Un-American"—a retreat from the constitutional mandate of equal protection. Those who hold this view however, fail to accord deference to some established tenets of Federal law.

Case law establishes beyond preadventure that historically, racial classifications have cast an ignominious shadow over the nation's history and its basic fundamental principles as a free democratic society.[1] These classifications were designed, utilized and enforced "explicitly or covertly to stigmatize, exclude or accord inferior treatment to minorities.[2] The Supreme Court's doctrine holding racial classifications constitutionally "suspect" arose in the context of these classifications which had the purpose and effect of disadvantaging blacks and other minorities.

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[1] *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *McLaurin* v. *Oklahoma*, 339 U.S. 637 (1950); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Sipuel* v. *Oklahoma*, 332 U.S. 631 (1948) (per curiam); *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1937); *Pearson* v. *Murray*, 169 Md. 478, 182 A. 590 (1936).

[2] *Bakke* v. *Regents of the Univ. of Cal.* 18 Cal. 3d 34, 67, 132 Cal. Rptr. 680, 703, 553 P. 2d 1152, 1175 (1976) (Tabriner, J. dissenting), aff'd in part, rev'd in part, 438 U.S. 265 (1978). See, e.g.,

The central purpose of the equal protection clause of the fourteenth amendment and of federal civil rights legislation was to protect blacks and others from oppression and discrimination inflicted by the majority. The Court has not implied that non-oppressive and non-invidious racial classifications imposed under these laws are suspect or impermissible. On the contrary, the Court has consistently permitted race to be taken into account for remedial purposes. See, e.g., *Bakke; Weber; Fullilove*, supra. These cases and others have upheld the utility of racial classification as a viable means of eradicating "badges of slavery" and promoting the goals embodied in the fourteenth amendment. Moreover, where segregation results from direct or indirect racially motivated public policies, the Constitution has been held to *require* favorable treatment of minorities.[3]

In the field of employment, societal discrimination has had particulary gruesome effects upon the lives of those who are the objects of that discrimination. These effects may never be mitigated without some form of preferential treatment being accorded to the innocent victims of the discrimination. Over a period of years blacks have been segregated from the mainstream of employment by law and custom. The overt and covert practices of excluding the black worker has had the unjust effect of providing the white worker with job security and economic development. The poverty experienced by many blacks today is a direct consequence of their history of unemployment. Unfortunately, the consequences of these institutional practices of radial dicrimination remain manifest. The actions which resulted in the exclusion of blacks were deliberate, systematic, and race-conscious. The plan for their inclusion must likewise be deliberate, systematic, and race-conscious.

It is against this background that a distinction must be drawn between racial classifications designed to discriminate and those designed to eliminate the plight of those who have for years suffered the dehumanizing effects of slavery.

The Constitution's guarantee of "equal protection of the laws" does not provide that race may never be used as a form of classification for scarce benefits. Furthermore, the Constitution does not provide that courts would be wrong to sanction such racial classifications. The problem is to determine when the racial classification is justified and when it is not.

The fact of being black does not *ipso facto* give rise to a moral claim for differential treatment, but the fact of blackness, in correlation with certain other considerations, may give rise to such a claim. W. Bernard, The Idea of Justice and Equality 127 (1971), Congress found the consideration of the historical and contemporary discrimination against blacks and others, which resulted in their underrepresentation in the nation's educational institutions and underutilization in the American labor force, sufficient to warrant their differential treatement. This decision is sound and in no way offends the equal protection clause. For one cannot properly speak of equal distribution of goods, whether it be educationally oriented or employment oriented, wihout taking into consideration the distribution of the opportunity of achieving these goods. Therefore, in order to treat all persons equally, to provide genuine equality of opportunity, society must pay attention to those with fewer native assets and to those born into less favorable positions, particularly where, as is the case with black Americans, the persons with fewer native assets—those born into less favorable conditions—were so born because of the intentional invidious acts of the majority. The idea is to redress the bias contingencies in the direction of equality. affirmative action requires no more than this—redressing the bias contingencies in the direction of equality.

Justice Blackman recognized the propriety of this school of thought. In the *Bakke* case he opined: "In order to go beyond racism, we must first take account of race. And in order to treat some persons equally, he must treat them differently." 438 U.S. at 407.

Until the bias contingencies are redressed in the direction of equality, that is until blacks and others who have been for years denied an equal opportunity to compete for this country's employment and educational opportunities, are fully

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Hunter v. *Erickson*, 393 U.S. 385 (1969); *Jones* v. *Mayer Co.*, 392 U.S. 409, 445–47 (1968); *Gayle* v. *Browder*, 352 U.S. 903 (1956) (per curiam).

[3] In *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), cert. den. sub nom. *Caddo Parish School Bd.* v. *United States*, 389 U.S. 840 (1967), the court of appeals held that school districts formerly segregated by law must go beyond neutrality and take affirmative action to bring blacks into formerly white schools. See also, *Swanm* v. *Charlotte-Mecklenburg Bd of Education*, 402 U.S. 1 (1971); *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971), cert. den., 406 U.S. 950 (1972); *Porcelli* v. *Titus*, 431 F.2d 1254 (3d Cir. 1970), cert. den., 402 U.S. 944 (1971).

integrated into the American labor force, at all levels of employment—and in the Nation's educational institutions, there will remain a need for affirmative action.

While affirmative action has to date yielded some positive results, there is clear and present need for its continued use. An inordinately high percentage of the black population is poor. Blacks have an unemployment rate of more than twice that of whites. Blacks are underrepresented in the Nation's educational institutions. The poverty and undereducation of blacks is a direct consequence of the well-entrenched patterns of discrimination which permeate this society even today. Affirmative action which takes race into account is the only viable means by which blacks can "catch up" and assume their rightful place in today's society. Any plan for achieving equal opportunity, after years of invidious discrimination, which does not take race into account is inadequate to erase the depth and incidence of discrimination which permeate this society. Such plans must be rejected forthwith.

The NAACP finds particularly odious the Justice Department's three-pronged approach to achieving equal opportunity which was aired before this Subcommittee yesterday, by Assistant Attorney General William Bradford Reynolds. The Justice Department's proposal reflects a complete abandoment of this Nation's affirmative action policy; and runs contrary to now established tenets of law. It is an affront to black Americans and others who suffer the dehumanizing effects of invidious discrimination.

The Department proposes to abandon the use of goals and timetables for hiring minorities and women in labor forces which have over the years accorded white males preferential treatment, and systematically excluded blacks and others. The Department would likewise retreat from its present policy of seeking broad class relief to "make whole" the victims of invidious discrimination, and require case-by-case litigation of individual discrimination cases. Each of these proposals runs contrary to the letter and spirit of the law and will turn the clock back more than forty years.

I have already suggested the fallacy of the notion advanced by the Department, that race-conscious affirmative relief to remedy the present effects of historical and contemporary discrimination, in some way offends the Constitution. Examination of the law regarding class relief and the use of goals and timetables belies the Department's position on these points as well.

Discrimination on the basis of race, color, religion, sex, or national origin are, by definition class discrimination.[4] Necessarily then, relief from discriminatory practices must be class relief—and the Supreme Court has recognized that the relief must be broad, affirmative relief.

Where a respondent has engaged in unlawful employment practices, Title VII specifically states that the courts have authority not only to enjoin continuation of the practice (as suggested by Mr. Reynolds to be the appropriate relief), but also, to order "such affirmative action as may be appropriate," 706(g), 42 U.S.C. 2000e–5.

Although the granting of affirmative relief is discretionary in nature, the Supreme Court has emphasized that Congress' purpose in granting the courts this discretion was "to make it possible for the 'fashion[ing] [of] the most complete relief possible.'" *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). The Courts are to: "[issue] broad remedial orders to eradicate discrimination throughout the economy and make persons whole for injuries suffered through past discrimination. Id., at 421.

In *Louisiana* v. *United States*, 380 U.S. 145, 154, the Supreme Court stated the duty of courts generally in cases of discrimination. This the NAACP believes is also the duty of the Justice Department: "[T]he court [and Justice] ha[ve] not merely the power but the duty to render a decree [and Justice to seek relief] which will so far as possible eliminate the discriminatory effects of past as well as bar like discrimination in the future."

In the *Weber* decision, the Court explained that this broad equitable relief could be fashioned even absent a specific judicial or administrative finding of past discrimination.

The relief may include the setting of race-conscious goals and timetables for hiring minorities and women (referred to by some as preferential hiring),[5] back pay, retroactive seniority, and any other relief deemed necessary to "make whole" the victims.

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[4] *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968); *Hicks* v. *Crown Zellerbach Corp.*, 49 F.R.D. 184, 188 (E.D. La. 1967); *Hall* v. *Werthan Bag Corp.*, 251 F.Supp. 184, 186 (M.D. Tenn. 1966). See *Monell* v. *Department of Social Services of N.Y.*, 357 F.Supp. 1051, 1054 (S.D. N.Y. 1972) (42 U.S.C. 1983 case). Congress confirmed this approach to Title VII by indicating an intent not to affect class action practice under the Act when it amended the statute in 1972.

[5] Although 703(g), 42 U.S.C. 2000e–2(j) counsels against preferential treatment, it is now well settled that this does not preclude preferential relief necessary to remedy past discrimination.

This is the present status of law—aimed at ameliorating the effects of historical and contemporary discrimination—a national policy of the highest priority. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 788-79 (1976).

The present effects of discrimination remain manifest. Black unemployment is more than twice that of whites. According to the National Urban League employment report, black unemployment is close to 31 percent.[6] Black male college graduates who are fortunate enough to find work, earn about the same annual income as white high school graduates. There are still disproportionately low numbers of blacks in managerial, technical and highly skilled professions. There is only 1 black doctor for every 3,400 black persons as compared with 1 white doctor for every 557 white persons.[7]

These statistics crystalize the fact that black Americans continue to suffer the expense and inconvenience of the deliberate race-conscious policies which have cast them into a second class citizenship. The present Administration must not falter from the position accepted by past Administrations and the Court, that deliberate, race-conscious measures must be taken to incorporate the victims of invidious discrimination, into mainstream America.

STATEMENT OF BENJAMIN L. HOOKS, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ACCOMPANIED BY ALTHEA T. L. SIMMONS, DIRECTOR, WASHINGTON BUREAU, NAACP

Mr. HOOKS. Thank you, Mr. Chairman. We were here 10 minutes to 9 but the bulletin gave the wrong meeting room. We sat in room 2175 for a half hour until someone came to look for us.

Mr. Chairman and members of the subcommittee:

I am Benjamin L. Hooks, executive director of the National Association for the Advancement of Colored People. Accompanying me today is Althea T. L. Simmons, director of our Washington bureau.

I appreciate this opportunity to appear before you on behalf of the more than 1,800 branches, State conferences, youth and college units of the association to voice our wholehearted support for the continuing use of affirmative action to achieve parity within the American labor force and educational institutions.

I have a written statement that I would like to request that it be entered into the hearing record. I will direct my oral comments to the Justice Department's three-pronged approach for achieving equal opportunity.

The NAACP believes that the Justice Department's proposal reflects a complete abandonment of this Nation's affirmative action policy and runs contrary to now established tenets of law. It is an

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In the *Bakke* case, Justices Brennan, White, Marshall, and Blackman summarized the law with regard to preferential treatment, in the following manner:

> [O]ur cases under Title VII of the Civil Rights Act have held that, in order to achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Such legislation has been sustained even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment, or a case-by-case determination that those to be benefitted suffered from racial discrimination. These decisions compel the conclusion that states also may adopt race-conscious programs designed to overcome substantial chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination. *(Regents of the University of California* v. *Bakke*, —— *U.S.* ——, 98 S.Ct. 2733, 2787. See Justice Powell's Response at page 2658, fn. 44).

[6] The Urban League counts unemployed persons, "discouraged workers", and 46 percent of the part-time workers who want full-time work.

[7] These figures were taken from a yet unpublished statistical study prepared by Dr. Elizabeth Abramowitz of Howard University's Institute for the Study of Educaticnal Policy (ISEP).

affront to black Americans and others who suffer the dehumanizing effects of invidious discrimination.

The Department proposes to abandon the use of goals and timetables for hiring minorities and women in labor forces which have over the years accorded white males preferential treatment, and systematically excluded blacks and others.

The Department would likewise retreat from its present policy of seeking broad class relief to make whole the victims of invidious discrimination, and require case-by-case litigation of individual discrimination cases. Each of these proposals runs contrary to the letter and spirit of the law and will turn the clock back more than 40 years.

Case law establishes beyond peradventure that, historically, racial classifications have cast an ignominious shadow over the Nation's history and its basic fundamental principles as a free democratic society.

These classifications were designed, utilized, and enforced explicitly or covertly to stigmatize, exclude or accord inferior treatment to minorities.

The Supreme Court's doctrine holding racial classifications constitutionally suspect arose in the context of these classifications which had the purpose and effect of disadvantaging blacks and other minorities.

The central purpose of the equal protection clause of the 14th amendment and of Federal civil rights legislation was to protect blacks and others from oppression and discrimination inflicted by the majority.

The Court has not implied that nonoppressive and noninvidious racial classifications imposed under these laws are suspect or impermissible.

On the contrary, the Court has consistently permitted race to be taken into account for remedial purposes.

Case law has clearly and consistently upheld the utility of racial classification as a viable means of eradicating "badges of slavery" and promoting the goals embodied in the 14th amendment.

Moreover, where segregation results from direct or indirect racially motivated public policies, the Constitution has been held to require favorable treatment of minorities.

In the field of employment, societal discrimination has had particularly gruesome effects upon the lives of those who are the objects of that discrimination.

This discrimination, on the basis of race, color, religion, sex, or national origin is, by definition, class discrimination. Necessarily then, relief from these discriminatory practices must be class relief—and the Supreme Court has recognized that the relief must be broad affirmative relief.

Where a respondent has engaged in unlawful employment practices, title VII specifically states that the courts have authority not only to enjoin continuation of the practice [as suggested by Mr. Reynolds to be the appropriate relief], but also, to order "such affirmative action as may be appropriate." 706[g], 42 U.S.C. 2000E-5.

Although the granting of affirmative relief is discretionary in nature, the Supreme Court has emphasized that Congress purpose in granting the courts this discretion was "to make it possible for the 'fashion[ing] [of] the most complete relief possible'." *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405 [1975]. The courts are to:

"[Issue] broad remedial orders to eradicate discrimination throughout the economy and make persons whole for injuries suffered through past discrimination." ID., at 421.

In *Louisiana* v. *United States,* 380 U.S. 145, 154, the Supreme Court stated the duty of courts generally in cases of discrimination. This the NAACP believes is also the duty of the Justice Department:

> [T]he Court [and Justice] ha[ve] not merely the power but the duty to render a decree [and Justice to seek relief] which will so far as possible eliminate the discriminatory effects of past as well as bar like discrimination in the future.

In the *Weber* decision, the Court explained that this broad equitable relief could be fashioned even absent a specific judicial or administration finding of past discrimination.

The relief may include the setting of race-conscious goals and timetables for hiring minorities and women [referred to by some as preferential hiring], back pay, retroactive seniority, and any other relief deemed necessary to make whole the victims.

This is the present status of law aimed at ameliorating the effects of historical and contemporary discrimination—a national policy of the highest priority. *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 778-79 [1976].

The present effects of discrimination remain manifest. Black unemployment is more than twice that of whites. Black, male, college graduates who are fortunate enough to find work, earn about the same annual income as white high school graduates.

There are still disproportionately low numbers of blacks in managerial, technical, and highly skilled professions. There is only 1 black doctor for every 3,400 black persons as compared with 1 white doctor for every 557 white persons.

These statistics crystallize the fact that black Americans continue to suffer the expense and inconvenience of the deliberate race-conscious policies which have cast them into a second-class citizenship.

The present administration must not falter from the position accepted by past administrations and the Court, that deliberate, race-conscious measures must be taken to incorporate the victims of invidious discrimination into mainstream America.

Thank you, Mr. Chairman, and the committee, for allowing me this opportunity to be heard on this very vital issue.

I will be happy to respond to any questions you may have.

Ms. Simmons, did you want to say anything at this point?

Ms. SIMMONS. No; I will answer any questions.

Mr. WEISS. Mr. Hawkins.

Mr. HAWKINS. May I express my own appreciation to Mr. Hooks and Ms. Simmons, both of whom have been in this fight for a long time, consistently since the early days. I think we certainly owe a debt of gratitude to the NAACP and to its executive director, Mr. Hooks, for the progress that has been made.

If there is any hope—and there is a small ray of hope—it certainly is through such leadership. So I think it is a great pleasure to have the testimony before the committee today.

Mr. Hooks, I am sure that you are fully aware of both the budget cuts as well as the efforts to reduce and to in some instances eliminate the enforcement of civil rights laws.

May I ask you what I believe I asked the other witnesses—I am quite sure there is general agreement between the views expressed by you in the statement and certainly the majority of this committee—why do you believe there has been so little public reaction to what is threatened in the unbearable budget cuts already being felt and the vast majority which have not yet had impact, the threat to the almost total elimination or lack of enforcement of civil rights laws and yet we seem to have as yet so little public discussion?

There seems to be some public support to what is being proposed. We deal with all of the reasons why it should not be, but why is it that there is a perception that budget cuts somehow are desirable, that everybody is going to get a tax reduction and that the laws are going to be enforced and there is so little reaction on the part of the public to this entire threat?

Mr. HOOKS. I am not altogether able to formulate answers to that important question except that I remember specifically that in the early part of this administration the NAACP spent almost $200,000 preparing an economic plan for recovery which we presented to Mr. Bush at the White House in the absence of Mr. Reagan during his recovery from a gunshot wound.

I remember when we came out of the west wing of the White House and we faced a battery of news people, the only question they really asked is why are you up here when it is all over up here?

The congressional Black Caucus went to great efforts to prepare a beautiful document. Mr. Fauntroy called a press conference. When the evening news came on they had a coverage that lasted about 5 seconds.

I think it is difficult to engender public debate when the established communication simply act as if there is but not one cited.

Recently there has been change, and I think that is for the better but in the early part of this administration it would almost get no attention anywhere. It is hard to discuss when you can't get it out before the public.

The recent Federal Communications Commission action to eliminate the fairness doctrine—I know it is extraneous to this discussion—certainly impacts on the ability of people who are in the minority.

I would hope that these hearings and other hearings we have attended will have the effect of focusing some attention to the fact that this administration is actually rolling back the kinds of enforcement action that have been proven to be effective.

When I went to the FCC I served as EEO Commissioner. They had those affirmative recruitment policies Mr. Reynolds talked about. They are almost meaningless. We didn't have to deal with affirmative recruitment, that doesn't mean hiring affirmatively. We had to deal with the results.

We went through ream after ream of paper where these enterprises had elaborate systems of recruitment—the Urban League and the NAACP. They say they advertise in black newspapers but nowhere were they required to say what happened when you recruited.

I think the administration ignores history or is not concerned about effective enforcement of the law.

I have tried to indicate that when you think in terms of the fact that most people who are discriminated against are the poorer people, who do not have access to lawyers and courts and do not understand the remedies, and you put the burden of eradicating discrimination on their backs, it is very unfair.

Mr. HAWKINS. May I suggest one possibility in trying to get the truth. That seems to be the most difficult thing. I recall the Vice President speaking to the NAACP Conference this year in defending budget cuts and the elimination and reductions in jobs programs, including CETA, the Comprehensive Employment and Training Act.

He made a statement that in many of these programs the administrative costs were as high as 60 percent. That statement was made to the public in reference to budget cuts in an effort to show these programs have not succeeded, that the employment programs of the sixties had failed, that CETA had failed, and so forth.

Since that time we have been trying to find out what program he was referring to. What program has as much as administrative costs of 60 percent? There was no backing up.

The President on national television has twice indicated that he was opposed to any cuts in social security. In one of the instances he made that statement we had already slashed social security at his suggestion.

He is going to go on TV tonight to repeat his pledge to support social security knowing full well there is no way to balance the budget unless we do slash social security and so we are going to listen to another episode of Jaws 2 talking about budget cuts.

Already in Congress in the Gramm-Latta budget reconciliation bill, there is going to be approximately 51-percent reduction in CETA, which means the total elimination of public service employment and the Young Adult Conservation Corps programs.

The credibility of our national leaders is involved. I was wondering if you, as the leaders of one of our great national institutions, might consider inviting such leaders to discuss the issues. I wonder whether it would be a good idea to do it contingent on the ability of any of the individuals making statements to which objections could be raised to verify some of the statements that they make. They will make a wonderful case of supporting equal rights, of being against discrimination, of not doing anything to hurt the needy knowing full well what they are doing is hurting people, yet we have no way of calling them to task for the statements they make.

Do you believe it would be feasible for organizations such as the NAACP to demand that those who seek to be heard before such groups be responsible for the statements that they make? How we could work it out is another matter.

I think the threat of saying beautiful phrases is that if you are not responsible for what you are saying, you are going to be held to task and what you say might be the means of eliminating some of them from the rhetoric which they profess to adhere to but we know full well they don't.

Mr. HOOKS. I think your premise is good. I am not sure how we can enforce it. What we did at our own conference, we only invited the President and the Secretary of Housing and Urban Development. We had a press conference immediately afterwards in which we attempted to go over certain statements made. Our rebuttal did not receive equal time to say the least, but at least our delegates were given information about that.

One of the other problems as I read the statement in the Washington Post a few weeks ago when Budget Director Stockman testified before Chairman Carl Perkins' Committee on Education and Labor, Mr. Stockman was throwing around some figures—Mr. Perkins rebutted him from the viewpoint of one who has been around for many years, Mr. Stockman said, well, if my figures are wrong we will go to something else.

In other words, the figures didn't mean very much.

The point is they are determined to cut without regard to who gets hurt. I was amazed at that exchange. Rather than the Budget Director saying let me go back and look at this—he instead said if your figures are right let's move on, it doesn't change my viewpoint.

I think the approach has been we decide how much we are going to cut and then we decide who it hurts and we don't really care. I think the NAACP, as an organization will be stepping up its rhetoric in terms of trying to get some attention to it.

In a fight like this you welcome all allies. I notice we have received strong support from Wall Street recently and I am not going to be very upset about the types of help I get. I don't know much about Wall Street but I welcome their investigation of certain policies.

The things that we said in the human rights and labor community are now being said by others and are getting repeated much better.

I would like to make clear for the record, as it relates to reverse discrimination, that it is almost ludicrous to think you can have 300 or 400 years of deliberate discrimination based on color and sex and you can simply close your eyes and say don't pay any attention to it and it goes away.

Our word has been reversal of discrimination because what we have had has been discrimination, as a previous witness testified, for white males. There is no question that every job in this country for a long time that was good was there for white males. Now that we are opening the door to everybody, I can sort of sympathize with how they feel but I don't agree they were ordained by God to have all those jobs and we are just simply correcting something that has kept in our history.

I am satisfied that white males who are competent and qualified will not be lost in this country. I think they will be able to make it.

Mr. HAWKINS. Mr. Chairman, may I just clarify the one point.

The comment about the actual 60 percent of administrative costs clause was not, per se, made at the NAACP convention. He did deal with administrative costs but the comment about the 60 percent was a result of a speech at Tuskeegee Institute. I just want to make sure we locate the point where he made the statement that was absolutely untrue.

Mr. WEISS. Mr. Washington.

Mr. WASHINGTON. Mr. Hooks, I join the acting chairman and Mr. Hawkins in welcoming you here this morning. I shall add that phrase reversal of discrimination to my growing list of phrases which I shall use in the future.

Mr. Reynolds yesterday clearly indicated that where a pattern of discrimination was found to exist they would combat it with affirmative recruitment. Are you privy to any discussions of the administration attempting to spell out what they meant by recruitment?

Mr. HOOKS. No, sir; I have not been privy to any conversations about that. In fact, my contacts with the administration have not been as extensive as I would have desired.

I am not trying to suggest that they have closed the door because they have not. They may be closed but I haven't knocked so I don't know.

What happened as I read his testimony on affirmative recruitment is if one is familiar with the history of this act and how we progressively were able to enforce it, affirmative recruitment was one of the first tools and remedies we used to try to get the employment situation in a better posture.

It was passed over, discarded, because it did not produce results as we wanted them.

As I mentioned about my Federal Communications Commission experience, when I went there in 1972 it was the only agency that had adopted an affirmative action program. I went through page after page of affirmative recruitment plans from radio and television stations. They were not working.

It was then in 1976 we came out with new regulations that had to do with affirmative hiring and looking at what happened.

I must say that strangely enough I served in a Republican administration, I was a part of the Democratic minority but the majority at that time at the Commission was favorably inclined toward enforcement of EEO law. They certainly didn't go as far as I wanted them to go but I suspect they would be viewed as speed demons by this new conservative republicanism we have.

I think affirmative recruitment is not only a step back but into something which has been proven unworkable. I have to conclude either total ignorance—and I hate to think that of a lawyer, I like to think of lawyers as qualified and able, being a lawyer myself—or it is a deliberate turning back on the kind of goals that we have been seeking to achieve.

Mr. WASHINGTON. It is in harmony with the general attitude. Mr. Reynolds also coined a phrase "nonvictims" in his opposition to this system and indicated they wanted the President to concentrate on a case-by-case approach. He didn't seem to understand that the reason the black or the woman was discriminated against was because they represented a class, or race, or group and not as individuals. He just seemed not to be able to grasp that concept. With a meat axe they chopped the budget and the same thing is happening in the concept of affirmative action.

I think the bottom line is the message has to be gotten out. People have to be aroused and have to combat this kind of flagrant attitude toward all these various programs and tools that have been designed to remove discrimination.

Mr. Hooks. I would just like to say one thing. I read that statement about nonvictims. As I came over this morning I talked to Ms. Simmons to try to get the background of that word.

Since I have been head of NAACP, I have tried to make it a point to say what had to be said without unnecessarily raising hackles, and what I am about to say now for the public record, it possibly will raise some because I believe it deliberately and calmly. I think every black in this country has been a victim of invidious discrimination—every black.

If you were born prior to the 1954 Supreme Court decision you were a victim of separate but unequal school system. If you were born since then we have gone through the struggle.

I suspect that in my adult life I have spent fully one-half of my working hours fighting for rights which white people in this country take for granted.

I might be as rich as the President if I had not had to do that. I don't regret it because I have some new shoes on. They didn't cost as much as some, but they are nice.

I would think that once we understand that, and when I say that I say that deliberately, not to raise hackles but as a fact. When we think of all the thousands of private clubs in this country where blacks cannot belong because they are not white, we are victims of discrimination, of a cultural heritage.

The most promising thing is there are millions of white people who at least know, acknowledge it, and are trying to help change it. It is unfortunate at this point in the history of this world and of this country we have brought to power people who have not known that.

This world is two-thirds colored and to have the kind of remarks and statements made is a disregard—and, Mr. Hawkins, it seems to me one of the things we must also expect is for more of our Republican friends and Democratic friends in the House and Senate who are white to speak out more loudly and more clearly.

I pray to God that may be happening in the next few days but I think I don't have any problem with saying this question of nonvictims is simply a loaded kind of thing that will not stand up under examination.

I know what Mr. Reynolds is attempting to say, if you didn't apply to the Senate for page boys' jobs, you are nonvictims even though the reason you may not have applied is because you knew they were not going to hire blacks 30 years ago. I guess he expects us to go into a useless exercise.

A question was raised about burdensome requirements. It is burdensome to me to have to go 55 miles an hour in a car that will do 90. The law says 55. It is burdensome to have to go to the airport and bother about advanced reservations. I wish they all ran like the Eastern shuttle.

There are a lot of things that are burdensome but they are necessary. I don't think because some employer says these things are burdensome they ought to be repealed without looking at the total cost to society.

I think in the area of equal opportunity employment while we have made great progress they have not been so burdensome as to require their removal or their revocation or even their diminution. That is exactly what is happening.

I read this speech with great interest to the committee because it starts off pretty good. After about the third page it runs downhill so rapidly that you wonder if you didn't have two different authors, one to start it and one to finish it.

I plan to address that at another time. I apologize for taking so much time.

Mr. WEISS. Mr. Hooks, of course that really is the thrust of the administration in area after area. The President comes on the air as the chairman indicated, and says that he wouldn't want to hurt people who are social security recipients, or young people who are looking for education, or he wouldn't want to do anything to turn our backs on either to create greater equality of opportunity.

Then you look at the programs he is suggesting and there is a question whether he has ever read what his Budget Director or department heads are in fact proposing in his name.

One of the networks this morning had a program referring to the signing ceremony of the Executive order on assistance by the Federal Government to traditional black colleges. They then had on the air the president of one of those colleges saying they had the same kind of Executive order during the Carter administration which is to provide greater focus of Federal contracts in the traditional black colleges. Of course, it never happened.

He said what he is really looking at is what is happening because of the cutback in tuition-assistance program grants and loans. In his college the student body applications fell from 1,700 last year to 1,300 this year because the youngsters who would be applying cannot afford it because of the Federal cutbacks in programs.

So I think what we have to do is to focus on the truth or put the truth to them because if we accept what they say without looking at the fine print of what they are actually doing I think we will all be in great trouble.

I didn't mean to make a speech.

Let me ask you: In the area of equality of opportunity, what do you think the ramifications will be in the minority communities if or when in fact the understanding spreads that this administration is in fact doing a reverse spin on that?

Mr. HOOKS. There are two possible consequences as I see it. One is that we had some figures released recently that point out some 50 percent of black youth of America are unemployed. That is a very dismal type of thing to consider.

In 1933, when conditions of white unemployment were not as bad as black, the scenario was that this country would undergo a violent revolution if something hadn't changed. I recognize there are high-bound Republicans who are still cursing Mr. Roosevelt but at least they ought to be grateful he made it possible for them to be around through the kinds of things he did.

Apparently we are expected to have a much lower boiling point than anybody else.

Despair and gloom, a sort of mental depression can be so deep that the black community could become an unproductive part of this economy, simply give up and fall into such a state of psychological depression that they could have a deterrent effect on the whole ability of this country to move forward. That is one kind of thing.

What happens to a dream deferred? Does it sag like a heavy load or does it explode? If you go from sagging like a heavy load to the farthest extreme it would be explosion and, of course, to say that is to invite criticism. There should be press present when I say something like that. They always come out; Ben Hooks says there will be a riot. I should say that that explosion can take many forms.

Of course, there is a middle ground in which we simply have to do what started to happen on Solidarity Day, trying to explain to the American public, and the only way you can attract attention through mass movement, that there are many of you who are concerned and we will now start our efforts for voter registration, voter education, and other kinds of efforts to bring back into public life people who are concerned and in a nonviolent sense punish our enemies and reward our friends.

We have some Democratic friends who deserted us at a very critical time in the House. We could have had more comprehensive hearings.

I think those are three possibilities. We sag like a heavy load, or we explode, or in the middle we may become more active.

My personal hope is we won't explode and that we won't sag. I get much more thrill out of exploding some of these in the Congress by retiring them from public office and let them get out in the private sector and deal with the problems out there as private citizens.

I would hope we can do that in the great American tradition of voting and peaceful change. I think we will be doing that.

Mr. WEISS. Thank you very much.

A last question, the chairman had asked the last witness to comment on the issue of goals and timetables against the attempt to characterize all of those numerical declassifications as quotas.

I know in the course of your written testimony you spend a good deal of time talking about the goals, and timetables and the legal and constitutional backing. I wonder if you would care to comment on the distinction between the two?

Mr. HOOKS. We at NAACP understand have what we call Dixonry meetings and then they have meanings in the common order usage. The word "quota" was an invidious word when used in the human relations sense that meant an artificial ceiling. It was used primarily with the members of the Jewish community when it was said you can have two of your kind, two Jews to go to Harvard, or Yale, or Princeton, you can have two do this but no more.

So a quota becomes a word for racial discrimination. It meant somebody in power selected an arbitrary number and said that you can have two but no more. So then NAACP has historically rejected the idea of a quota. We don't want anybody to say there can only be 19 black Congress people at any given time.

But we do believe in the concept of goals and timetables. This is in the American tradition. I don't know of any way we measure anything without goals or timetables. If you are a salesperson or a Congressperson, you have some goals and you have to reach them in time and space.

We decided we wanted to have the automobile industry deal with the emission of pollution and so we set a fuel efficiency criteria—by January 1, 1983, a hypothetical date—automobiles must get at least 27.3 miles per gallon. That was a goal and a timetable was set.

We decided to save gas, so we set the maximum speed limit at 55 miles per hour. Likewise with Federal income tax reporting, we set an arbitrary filing date of April 15.

Why is it that in the field of human relations it has become such a bad thing to have goals and timetables, I fail to understand. It is, again, in my judgment, symptomatic of this administration as even opposed to recent Republican administrations.

I recall at the FCC we were arguing about goals and timetables and one of the Commissioners was a little apprehensive, but President Nixon said I approve of goals and timetables. All of a sudden the opposition caved in.

That is why I say we are reinventing the wheel. A goal is a floor that you must reach and then you can go as far above it as you want.

The Congress operates on a timetable. Sometimes I remember it seemed to me the clock was stopped so you could operate with any timetable. It didn't make any difference what time it was. I just think it is much ado about nothing in one sense to pretend that goals and timetables are quotas but even though that is my position I defend it with all my might, if we use the word "quota" in the other sense not an artificial ceiling, I almost feel like saying so what?

The quota was 100 percent white males for 300 years and we didn't have any help on it. Now that we might say there ought to be a woman there, or a black, or a Hispanic-American, oh, my God, no, you are making people who didn't have anything to do with past discrimination pay for it.

That is a subtle predisposition to the fact that somehow white males are better qualified. You have to accept that premise if you are saying you are making a person pay for something he is not responsible for.

I have not been able to pin down instances where a woman or minority has been hired into a job where he or she was less qualified.

Finally, the whole business of qualification can be overworked. I am not at all sure we have the best qualified man in the whole wide world to be President but we have a President.

I am not at all sure they have the best man or woman to be executive director of NAACP but I am it and I will stay there until I lose out.

I am not sure we have the best qualified 100 people to be Senators or the best qualified 435 people to be Representatives, but you are there and you are the best we have.

Whenever they let one person in there are all kinds of subliminal and subjective criticisms going to qualifications. It sickens me to see people raise qualifications to a scientific art so they say A is better qualified.

When Henry Ford became president of Ford I am not sure he was the best qualified man at the age of 25 to have that job but I am sure he was the senior grandson of the owner.

As I read about selecting a new chairman of General Motors there are all kinds of factors that go into it. I am amazed and disturbed by the vast amount of misinformation that is going out about affirmative action.

You have young white men who fervently believe they are not going to get a job because some woman who is less qualified is going to get it.

I say to them, you have to prove, first of all, that the women are less qualified. If you are superior, then you have to demonstrate it.

When we had women out of the work force and blacks out of the work force and 50 people applied for the presidency of Western Maryland State College, or Yale or Harvard, they could only select one. I didn't hear all these cries of anguish about how they got the less qualified person.

It is only when we started to include it that the psychological revelation that somehow if a white man loses his job he didn't lose it because he was less qualified but because they were trying to satisfy some intangible requirement. I think that you members of this committee, my organization and others have to start raising more truth about this and try to demolish some of the lies because affirmative action has become synonymous in some quarters with reverse discrimination and no greater lie has been perpetrated.

Those of us who have gone through the recent history of World War II ought to be mindful of how much damage can be done by this big lie. If you say it often enough, long enough, loudly enough, it becomes the truth even though it is a lie.

I pledge to you, members of this committee, that the NAACP will do all that we can to disabuse the Nation of the notion that trying to include all of in is in any way reverse discrimination. It is reversal of historic past discrimination.

Mr. Weiss. Thank you very much. I think it has been very important testimony and we are privileged to have you as witnesses today.

Our next group of witnesses is a panel, Dr. Bernard Anderson and Dr. Marcus Alexis. Your full statements will be entered into the record in their entirety. We shall be pleased to hear from you.

[The prepared statement of Bernard Anderson follows:]

Prepared Statement of Dr. Bernard E. Anderson, Director, Social Sciences Division, the Rockefeller Foundation

Mr. Chairman and Members of the Subcommittee: Much of the discussion concerning affirmative action focuses on whether special efforts to assist minorities and women are necessary to assure their successful participation in the labor market. Many critics argue that attitudes toward race relations have improved to a substantial degree and discrimination is no longer a major factor in explaining employment and earnings disparities among minorities and others. According to this view, economic growth, and the expansion of jobs through unregulated, free market processes is all that is required to improve the economic status of minorities. If this view is correct, then there might be a legitimate reason to discontinue affirmative action policies designed to assure equal opportunity in the workplace.

Unfortunately, the available evidence does not support the conclusion that recent improvements in the employment and earnings position of minorities were the result of salubrious "free market" processes, and that future gains for minorities will be assured in the absence of affirmative action. There is some evidence, some of which will be cited below, to suggest that just the reverse is true, namely, much of the progress achieved by minorities and women in some occupations and industries was either the direct result, or was substantially influenced by affirmative action remedies to employment discrimination.

Perhaps an analogy would be helpful. The position of blacks and other minorities in the economy is like that of the caboose on a train. When the train speeds up, the caboose also moves faster. When the train slows down, so does the caboose. But no matter how fast the train might go, the caboose will never catch up with the engine unless special arrangements are made to change its position.

So it is with minorities and the economy. As the economy improves, so will the status of some minorities; and as the economy worsens, minorities will also be hurt. But even during the best of times, there will be no change in the relative position of minorities unless affirmative action, or other special measures are taken to assure their full participation in the widest range of employment and income earning opportunities.

Policies designed to improve the relative position of minorities are justified by the continuing evidence of racial inequality in American economic life. In 1980, black unemployment was more than twice that of whites (13.2 percent vs. 6.3 percent). Unemployment among black teenagers now officially reported at close to 50 percent, has been greater than 30 percent throughout the past decade, but has not reached that level among white youth in any year during which the official statistics have been recorded. Further, the employment/population ratio, for some purposes a more instructive measure of labor market participation than the unemployment rate, has steadily declined among black youth while increasing among whites. About 25 of every 100 black youth had jobs in 1980, compared with 50 of every 100 white youth.

Comparative income data also show continuing evidence of economic disparity between blacks and others. In 1979, the average black family had only $57 for every $100 enjoyed by whites. The ratio reflects a decline in the relative income position held by black families in 1975, a decline experienced in every major region of the nation. Even in families headed by persons fortunate enough to work year round, blacks have failed to achieve income parity, earning only 77 percent of the income of comparable white families.

In my judgment, a necessary national goal should be to move toward a narrowing, and the eventual elimination, of such disparities. It would be incorrect to say that the continuing presence of such economic inequality is entirely the result of overt or systemic discrimination, and that affirmative action alone would improve the economic position of minorities.

There is no question, however, that much of the income and employment disadvantage of blacks and other minorities reflects the accumulated impact of past discrimination, and the continuing presence of many seemingly objective policies in the workplace that have disproportionately unfavorable effects on the hiring, training, and upgrading of minority group workers. Affirmative action has an important role to play in correcting such inequities.

Some critics of affirmative action argue that such policies require employers to do only what they would do in their own self interest in the absence of affirmative action. There is ample evidence to refute this claim, but perhaps the experiences of one company might suffice.

In 1969, I completed my doctoral dissertation, a study of Negro employment in public Utility industries.[1] Part of the study included an analysis of the employment practices of the telephone industry, including AT&T and its Bell Telephone operating companies. At that time, black workers represented 6.7 percent of the nearly 600,000 employees in the Bell System, and were largely composed of black women employed as telephone operators. Only 2.4 percent of Bell's black employees were in management (compared with 12 percent among whites), 7.2 percent were skilled craftsmen (compared with 26 percent among whites); and less than one percent were in professional jobs (compared with 8 percent among whites).

In 1971, the Equal Employment Opportunity Commission (EEOC) issued a charge against AT&T and its affiliates for discrimination against minorities and women. In 1975, after prolonged litigation and negotiations, EEOC and AT&T agreed to a consent decree designed to correct the inequities in the company's employment practices, and to provide back pay to many minority and female employees who had not enjoyed full equal opportunity in the past. As a result of the decree, AT&T has made substantial progress in eliminating discriminatory hiring and promotion procedures, and in correcting gross under representation of minorities and women in certain occupations through the use of strict goals and timetables. In 1979, blacks and other minorities accounted for 14.4 percent of the Bell System's managerial employees, 18.7 percent of the outside craftsmen, 19.1 percent of inside craftsmen, and 23.3 percent of the sales workers.[2]

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[1] Bernard E. Anderson, Negro Employment in Public Utilities (Philadelphia: Industrial Research Unit, Wharton School, 1970).

There were no "natural forces" evident within AT&T in 1968 to suggest that the progress achieved in the company's employment of minorities and women during the past decade would have occurred in the absence of affirmative action. The consent decree was the catalyst necessary to spur the company toward many positive changes in personnel policies that top management today lauds as beneficial to the firm. The more efficient and equitable personnel selection and assessment system adopted by AT&T and its Bell operating affiliates puts the telephone company in a much stronger position to compete with other firms in the increasingly difficult and complex information systems markets.

The experience of AT&T, and other firms specifically identified as subjects for affirmative action enforcement is instructive for understanding the potential impact of affirmative action on the occupational status of minorities. For purposes of public policy formulation, such evidence may be more useful than broad aggregative studies that attempt to show the relationship between affirmative action and minority employment opportunities. Studies that attempt to analyze data for black workers as a whole often cannot separate out the partial effects of affirmative action programs from the total effects of all antidiscrimination programs. Further, such studies often have been unsuccessful in measuring the unique impact of affirmative action on minority group occupational trends during periods of expanding economic activity.

As a result, much of the current debate among economists about the impact of affirmative action on minority economic progress is inconclusive. Quite frankly, public policy concerning the future of affirmative action is unlikely to be informed, much less enriched, by the conflicting evidence now available on the economics of discrimination. That is not say the reserach by economists should be ignored. Instead, the prudent course of action by policy makers would be to weigh the evidence on both sides of the issue, and make a choice which reflects not only the economic research but also the employment gains achieved through the actions of enforcement agencies, such as EEOC and OFCCP.

UNFAIR CRITICISM OF AFFIRMATIVE ACTION

Another argument that should be laid to rest is that affirmative action has been unsuccessful because it has not contributed to the improvement in economic status of the underclass. Some have suggested that if affirmative action has helped anyone at all, it has benefitted only a relatively small number of well educated minorities who were destined to achieve success even without special assistance. A few critics go further to suggest that affirmative action has generated a widening gap within the black community between those with better education and stable work experience, and the less fortunate, who in many cases are restricted to a life of dependency and long term unemployment.

There is evidence to suggest that much of the progress achieved by blacks in some occupations, such as managerial jobs where their numbers doubled during the past decade, was largely the result of the goals and timetable requirements imposed on many business firms.[3] Much the same can be said about some of the gains blacks reported in professional, technical, and skilled blue collar jobs.

In fact, the black community is no longer monolithic. It consists of persons now employed in a widening range of occupations, representing equally diverse earnings. The so-called "black middle class" is not limited to professionals in white collar jobs, but includes skilled craftsmen, technicians, and many semi-skilled blue collar workers whose family income, often representing contributions from both husband and wife, exceed $30,000 per year.

At the same time, the status of some segments of the black community has worsened in recent years. This is especially true of black families headed by single women. Between 1970 and 1980, the number of such families grew by 73 percent, while all American families increased by 12 percent. The median income of black female headed families is $7,740, or only 44 percent that of husband-wife families.

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[2] Herbert R. Northrup and John A. Larson, The Impact of the AT&T-EEOC Consent Decree (Philadelphia; Industrial Research Unit, Wharton School, 1979).

[3] Julianne Malveaux, "Shifts in the Employment and Occupational Status of Black Americans in a Period of Affirmative Action," Rockefeller Foundation Working Papers, Bakke, Weber and Affirmative Action, December 1979, pp. 137–170.

Almost half of black female headed families live in poverty, compared with only 23 percent of similar white families.

The alarming situation among black female headed households should be a matter of national concern, but the worsening of economic conditions for this group does not suggest a failure of affirmative action. Through affirmative action, minorities and women who are prepared to compete in the labor market are assured the opportunity to do so. Those who are disadvantaged because of limited basic skills, training, and work experience are less likely than others to benefit from special efforts designed to protect equal job opportunity. Education, job training, and job creation programs are a necessary prerequisite to affirmative action as measures to improve the status of specially disadvantaged groups, such as black female single parents.

AFFIRMATIVE ACTION IN GOOD TIMES AND BAD

The consensus projection for economic activity during the next year suggests a rise in unemployment followed by more rapid economic growth with its attendant expansion in private sector jobs. Affirmative action is necessary on both sides of the business cycle.

When economic activity lags and unemployment is rising, affirmative action is necessary to assure that an unreasonable burden of the adjustment to economic change does not fall upon minorities and women. The federal government should encourage employers to voluntarily adopt workforce adjustment measures that soften the blow on previously excluded groups. Conversely, when economic activity is expanding, affirmative action is necessary to assure full participation by minorities and women in jobs across the widest range of occupations and at all levels of the firm.

The failure to preserve, and strengthen, affirmative action would run the risk of reintroducing employee selection criteria that have the effect of screening out disproportionate numbers of minority group persons who are fully qualified for the available jobs. Many employers now have systems in place to widen their range of recruitment sources, rationalize their assessment of job applicants, and improve their ability to select employees for promotion on the job. These measures have been adopted in response to affirmative action requirements, and should continue to be used. Such measures do not impose an unreasonable burden on employers and have become a routine part of the business operation. Affirmative action represents a beacon of hope to millions of minorities who want only an equal chance to compete in the market place.

STATEMENT OF BERNARD E. ANDERSON, DIRECTOR, SOCIAL SCIENCES DIVISION, THE ROCKEFELLER FOUNDATION

Mr. ANDERSON. Mr. Chairman, let me begin. I am on leave from the university and I want to give over some of my time to Professor Alexis who is still in the university and professors need more time to say what they have to say.

Let me express my high regard for Congressman Hawkins for whom I have the deepest respect and highest admiration only in part because of his enormous and dedicated service on behalf of full employment that many of us were involved in.

It is always a pleasure to receive a letter from Congressman Hawkins and I don't consider that an invitation. I consider it a duty to come when he asks.

Let me say that I would like to make several points, some of which are expanded upon in the formal statement but they are aimed at the question of the relationship between affirmative action and changes in the economic position of minorities in the economy as a whole.

You are undoubtedly familiar with the raging debate that is currently under way involving such persons as Professor Sowell and Professor Walter Williams and others who claim that affirmative action is neither necessary nor desirable as a means for achieving improvements in the overall economic position of minorities.

If that is so, if in fact nothing other than the operation of the free market unfettered by any regulation is necessary for the improvement in the relative economic position of minorities, then it goes without saying affirmative action is unnecessary and there would be a legitimate reason to abolish it.

I regret to say the available evidence does not support that conclusion and that, in my view, there is evidence at all that the salubrious operation of a so-called free market has been responsible for the kinds of gains, minimal as they have been, that have been observed in the position of minorities over the past several decades.

I think an analogy might help in this case. I think the relationship between minority economic progress and changes in the economy as a whole is like that of a caboose on a train which is to say if the train moves faster, the caboose moves faster. If the train slows down, the caboose slows down.

But unless you do something special, if you move the caboose to another track or do something else, the caboose will never catch up with the engine.

What we are saying here is if you look at the position of minorities in the American economy it is very comparable to that. If the economy is moving ahead you have balanced growth, you have the expansion of jobs. Of course, the position of many minorities will improve.

Conversely, as the economy slows down, unemployment rises, there are fewer jobs available, and the position of minorities will be worsened.

If one of the objectives of our Nation is, and I would suggest it should be, to narrow these gross disparities between minorities and others in the economy, then something other than the pure and free and unfettered and unregulated operation of the economy will be necessary and I consider that other thing to be affirmative action.

Without it there will be no significant improvement in the relative position of minorities. What do we mean by the relative position? We mean that position which does not exist when as we saw in 1980 the black unemployment rate was twice that of whites, when as we have seen over the past 20 years the rate of unemployment among black teenagers has been greater than 20 percent over the past 10 years and is now close to 50 percent.

In no year during which unemployment statistics have been recorded has the rate of unemployment among white teenagers been as high as 20 percent. But it has been higher than that level for black teenagers for the last 20 years.

If one looks at these disparities, labor market participation rates, employment population ratios, median family income, you see vast disparities between the minority community, blacks in particular, and other communities.

I believe that it is not enough to say there should be opportunity available. We should be moving as a Nation toward narrowing those differentials. Unless we have a special effort aimed at the groups most disadvantaged, there will be no significant narrowing of those differentials.

There are those who suggest that the statistics show the failure of affirmative action to have certain positive effects in achieving goals that I have articulated.

I believe that statistical evidence for reasons pointed out in my evidence should be called into question and I do not think that it is possible to look at broad aggregative economic studies and draw any firm conclusions about the relationship between affirmative action and the change in the overall position of minorities in the economy.

I think better evidence is to look at specific cases in which firms have been the object of affirmative action remedies and see what happened in those firms to the employment of minorities.

The example which I present is one of the A.T. & T. and the Bell Telephone System. I had the privilege in 1969 of completing my doctoral dissertation at the Wharton School on negro employment in public utilities and as part of that study I analyzed the employment position of blacks within the Bell Telephone System.

At that time—and this was for 1969, only 6.7 percent of the nearly 600,000 employees were black. Most of them were black women working as telephone operators. Only 2.4 percent of their black employees were in management, 7.2 skilled craftsmen and less than 1 percent were in professional jobs.

As you know, in 1971, the EEOC issued a charge of discrimination against the company. In 1973, there was a consent decree entered into between the Commission and the company, and by 1979, as a result of the application of strict goals and timetables the results were as follows: By 1979, 14.4 percent of the Bell System's managerial employees were black. Eighteen percent of the outside craftsmen, skilled jobs in which men and women erect the telephone lines, and so forth, 18.7 percent of those jobs were held by blacks. Of the inside skilled craftsmen, 19.1 percent were held by blacks and 23.3 percent of the sales workers were black.

If you want to see the impact of affirmative action I would submit to you that you have to look at cases like that to see where a company—the same thing can be said if you look at other companies—as to what happens as a result of companies applying these requirements.

The Chairman of the Board of A.T. & T. reported, I think in Washington in a speech before the Press Club last year, that they were very happy that they had adopted these new procedures because it helps them develop a more efficient, orderly, systematic way of assessing their work force.

So the Bell System today is in a much better system to compete in the increasingly difficult communications and information industry than they would had they not opened up the opportunities for a broader range of employees.

I will end with that statement to say that I simply see no justification in any of the statistical evidence to suggest that continued improvement in the relative economic position of minorities will occur in the absence of affirmative action and for that reason I find it very difficult to understand why anyone would suggest that doing away with affirmative action requirements would have no impact at all on the economic position of these groups.

Thank you.

Mr. WEISS. Dr. Alexis.
[The prepared statement of Marcus Alexis follows:]

PREPARED STATEMENT OF MARCUS ALEXIS, NORTHWESTERN UNIVERSITY

Chairman Hawkins, member of this subcommittee, I am happy to be able to accept your invitation to appear here today. My comments focus on affirmative action in higher education. The relationship between higher education, training and employment is also discussed.

INTRODUCTION

For nearly a decade institutions of higher education have been subject to Executive Order 11246 as amended by Executive Order 11375—Revised Order No. 4—and applied to nonconstruction contracts of colleges and universities. These orders have been the subject of considerable controversy in higher education. Critics have charged that affirmative action in colleges and universities results in (1) reduced standards of excellence; (2) restrictions on academic freedom; (3) interference with university governance; and (4) imposition of quotas. They have also argued that affirmative action has been ineffective as applied to institutions of higher education.[1]

The intense debate surrounding affirmative action in college and universities grew more heated as a result of the *Bakke* case.[2]

To fully understand the issues raised in *Bakke* and to evaluate the overall effects of affirmative action one must review the record of what has been going on in minority enrollments in higher-education institutions in recent years.[3]

Charges by critics, referred to above, are unsubstantiated. Indeed, affirmative-action programs in higher education have had many salutary effects. These benefits include but are not limited to (1) greater presence on major U.S. campuses of qualified minority scholars; (2) enrichment of intellectual dialogue and course offerings by the presence of minority scholars; (3) increased interest in careers in higher education by minority students; (4) broadening of the universe from which scholars at eminent colleges and universities are recruited; and (5) development of more objective bases on which to determine qualifications for employment, promotion, and tenure. These results are largely products of the times in which increased interest in minorities as participants in higher education took place. They developed before the issuance of the executive orders, following the civil rights activity of the late 1950s and 1960s.

Minority scholars, induced in part by the promise of opportunities formerly foreclosed, turned in increasing numbers to the scholarly professions. In the late 1960s and throughout the 1970s there were increased pressures for job rationing and favoring established ties. The gains made in the last years of the 1960s and the early years of the 1970s were threatened.

Racial, religious, and ethnic bigotry in American colleges and universities is a matter of record. Some of the most prestigious colleges and universities did not accept black students until after World War II; they were not accepted at Princeton (with the exception of the World War II special program for the armed services), nor were they accepted at Washington University (St. Louis), Vanderbilt University (Nashville), or in any one of the state universities of the old Confederacy. Most of the prestigious colleges and universities also discriminated against Jews in undergraduate and graduate programs and as faculty members. Women too have been discriminated against in higher education.

Overt discrimination based on race, religion, ethnic origin, or sex has been virtually eliminated from the campuses of all American universities. There is still, however, an underrepresentation of minorities and women. Supporters of "meritocracy" attribute this deficiency to the paucity of "qualified" minorities and women. The representation of minorities and women is directly related to the policies and practices of the past and to recruitment arrangements that persist to this day; this underrepresentation can most equitably be reduced by a policy of rigorous enforcement of affirmative action. Effective affirmative action does not require rigid quotas; it does require consideration of the available pool of minorities and women and their qualifications. Employers must not only refrain from policies and practices that operate to discourage women and minorities from being successful candidates but that they take action to remedy the effects of past discrimination. Among other things, they are required to be specific about qualifications and to demonstrate them to be job-related.

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[1] Thomas Sowell, "Affirmative Action Reconsidered," paper submitted for the record, Hearings on Affirmative Action as Applied to Institutions of Higher Education, U.S. Department of Labor, Office of Federal Contract Compliance, August 20, 1975.

[2] *Regents of the University of California* v. *Bakke*.

[3] Marcus Alexis, "Summary of Presentation, Reconvened Hearings on Affirmative Action as Applied to Institutions of Higher Education," DuBoise Institute Report 1, Spring 1971, pp. 1-19.

The participation of minorities and women in higher education is important for at least two reasons. First, there are countless numbers in both groups who have the abilities and the inclinations to benefit from the instructional programs at the most eminent colleges and universities. It is these colleges and universities and the leading colleges of law and medicine that have been the focus of most of the recent clamor about affirmative action. The reasons are quite clear. Professional opportunities—in teaching and research—open to graduates of the prestigious institutions are much greater than they are for graduates of lesser-known institutions. Also, applications for admission to colleges of law and medicine are many times larger than the available places. This creates a need to ration. The method of selection used by most law and medical schools under such pressure is to weight undergraduate grades and scores on standardized tests. Minority students tend to fare much worse on such tests than whites. An important question, one that is beyond the scope of this paper, is how well the scores on these tests measure the aptitude or capacity of minority students for successful completion of the graduate or professional programs in question. This question is currently being studied by a committee of the National Academy of Sciences.[4]

THE SUPPLY OF MINORITY COLLEGE APPLICANTS

Minorities, especially blacks, Puerto Ricans, and Mexican-Americans (Chicanos), are becoming an increasing fraction of college-age young people. The birth rates of blacks, Puerto Ricans, and Mexican-Americans are much higher than for Americans as a whole. According to the Census Bureau, in the 20 to 24 age group, the number of nonminority persons will decline slightly from 1970 to 1980. The number of blacks will increase 38 percent and the number of Spanish-surnamed persons will increase 43 percent during the same period.[5] Thus, by 1980 the 20 to 24 age group will be 22.4 percent minority, which represents an increase of five percentage points over the 1970 level. As this is the age group from which college students will be drawn, there will be a larger potential pool from which to draw minority students.

There have been dramatic changes in the college enrollments of black students. Black freshmen increased steadily from 5.0 percent in 1967 to 7.4 percent in 1974, a 50 percent increase.[6] While there were some year-to-year variations, the trend has been unmistakably upward. Total college enrollment of blacks increased from 370,000 in 1967 to 814,000 in 1974—more than doubling. The comparable figure for white students is 5,905,000 in 1967 and 7,781,000 in 1974.[7] Thus, while white college enrollments were increasing by 32 percent, black college enrollments were increasing 120 percent of four times as fast. It is not certain what accounts for this explosion in black college enrollments, but surely the high level of economic activity during the late 1960s and early 1970s and the widening opportunities for black college graduates—brought on partly by antidiscrimination legislation and the civil rights activity of the late 1960s and the 1970s—must have played a role. Black youngsters responded in impressive numbers to the perceived change in labor-market conditions. No matter what the rhetoric, large numbers of young blacks have voted with their tuition dollars and deferred incomes, deciding that a college education is a worthy investment.

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[4] Committee on Ability Testing of the National Academy of Sciences. The report of this committee is expected to be released in late 1980 or early 1981. The scope of the inquiry of the committee is much larger than testing for admissions to graduate and professional schools; it encompasses precollege testing and testing for employment.

[5] U.S. Bureau of the Census, Census of the Population: 1970. Vol. I, Characteristics of the Population, Part 1, United States summary, Section 2 (Washington, D.C.: Government Printing Office, 1973), pp. 593-95; U.S. Bureau of the Census, Census of the Population: 1970, Subject Reports, Final Report PC (2)-1C, Persons of Spanish Origin (Washington, D.C.: Government Printing Office, 1973), p. 8.

[6] ACE Research Reports, National Norms for Entering College Freshmen, Fall 1966—Fall 1972 (Washington, D.C.: American Council on Education); The American Freshman: National Norms for Fall 1973 and Fall 1974 (Los Angeles: American Council on Education and Cooperative Institutional Research Program, University of California at Los Angeles).

[7] U.S. Bureau of the Census, Current Population Reports P-20, No. 278, "School Enrollment—Social and Economic Characteristics of Students: October 1974," Table 1, Advance Report, February 1975 (Washington, D.C.: Government Printing Office).

The story is no less impressive for shifts in field of study and enrollment in graduate programs. Improvements in the labor market for educated blacks have increased blacks' college attendance and induced shifts in fields of study in pursuit of postgraduate education.[8] The study of education has traditionally had the greatest attraction for black students. In 1973-74, the last year for which data are available, more than one-quarter (23.9 percent) of all black college graduates earned their bachelors' degrees in education. Of blacks in the class of 1975 (freshmen in 1971) only 11.1 percent planned to major in education; high school seniors in 1971—the class of 1976—had an even lower percentage of students planning to major in education (10.5). Some of this decline can be accounted for by the decreasing job opportunities in public school teaching. Shifts in interest as students become informed of new opportunities in other fields most certainly play a large role.

This shift in field of study is also apparent in the social sciences, another traditional major of black students. In 1973-74, 26.0 percent of the black students receiving bachelors' degrees were in the social sciences; the corresponding percentages for the classes of 1975 and 1976 were 19.5 and 14.9, respectively. The magnitude of the shifts strongly suggests that they are not statistical illusions but represent genuine changes in vocational choices. Every field, with the exception of the physical sciences, gained significant numbers of black students, though, as we have pointed out, there were sizeable shifts in the percentage expressing interest in education and in the social sciences. Among the largest gainers in the enrollment shifts of black students were biological and health sciences, engineering, and the "professions" (law, business, etc.). Even mathematics experienced a 50 percent increase between the classes of 1973-74 and 1976.

It is noteworthy that nearly 15 percent of black high school seniors in 1971 indicated an interest in biological and health sciences. This compares with 7.5 percent of those receiving bachelor's degrees in 1973-74. If this doubling of young blacks entering biological health sciences holds up, the pool of young blacks potentially available for application to medical schools will have doubled in two short years. Even if one-third of those high school seniors specifying an interest in biological and health sciences were to shift majors, there would still be a one-third increase in the number of potential applicants.

The same trends evident in undergraduate enrollments and fields of specialization can be found in graduate enrollments. By whatever standard used, total minority enrollment and the proportion of blacks in master's and doctorate programs have been on the increase.[9] In 1973-74, minorities in medical schools accounted for 7.4 percent of the total enrollment and blacks alone were 6.0 percent. In 1974 there were an estimated 6,00 black physicians in the United States;[10] black enrollment in medical schools that year was over 3,600. In less than eight years from now, the number of black physicians, based on 1973-74 medical school enrollments, will have doubled.

As an aside, black enrollment in medical schools is larger than black enrollment in the natural sciences at the master's and doctorate levels in PH.D.-granting institutions, even though the total enrollment of all students in these institutions was more than twice the total enrollment in medical schools. When opportunities exist, blacks and other minorities will respond quickly and in large numbers.

It should be pointed out that most of the black medical student enrollment is in white institutions. Howard and Meharry, the two traditionally majority black medical schools, account for less than one-quarter of the black medical student enrollment. This contrasts with the more than 60 percent of black physicians practicing in 1974 who are graduates of the two historically black medical schools.

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[8] National Scholarship Service and Fund for Negro Students, Minority Youth: The Classes of 1972 and 1973 (New York: NSSFNS, 1974); alan E. Bayer, The Black college Freshman: Characteristics and Recent Trends (Washington, D.C.: American Council on Education, 1972); American council on Education, Higher Education Panel, 1975 (unpublished data); analysis of data from NAS, NRC, Doctorate Records File, May 1975; I. Bruce Hamilton, Graduate School Programs for Minority/Disadvantaged Students (Princeton, N.J.: Educational Testing Service, 1973); and Elaine H. El-Khawas and Joan L. Kinzer, Enrollment of Minority Graduate Students at Ph. D—Granting Institutions, Higher Education Panel Report 19 (Washington, D.C.: American Council on Education, August 1974).

[9] U.S. Department of Health, Education, and Welfare, Office for Civil Rights, Racial and Ethnic Enrollment Data from Institutions of Higher Education, Fall 1970 (Washington, D.C.: Government Printing Office, 1972); U.S. Department of Health, Education, and Welfare, Office for Civil Rights, Racial and Ethnic Enrollment Data from Institutions of Higher Education, Fall 1972 (Washington, D.C.: Government Printing Office, 1975); I. Bruce Hamilton, Graduate School Programs for Minority/Disadvantaged Students (Princeton, N.J.: Educational Testing Service, 1973); National Association of State Universities and Land-Grant Colleges, figures derived from Fall 1972 survey of minority enrollment (enrollments for first professional degrees are included); Elaine H. El-Khawas and Joan L. Kinzer, Enrollment of Minority Graduate Students at Ph.D. Granting Institutions, Higher Education Panel Reports, No. 19 (Washington, D.C.: American Council on Education, August 1974).

[10] National Medical Association.

MEDICAL SCHOOLS

The *Bakke* case concerned itself with admissions to a medical school. (The other case of admissions practice that received widespread attention recently involved a law school, at the University of Washington in Seattle. This was, of course, the case of *DeFunis* v. *Odegaard*.[11] Medical schools occupy a special place in American higher education and American culture. As the source of both scientific and practical training for physicians, their admissions policies determine who will be permitted to enter the highly esteemed and renumerative profession of medicine.

As indicated earlier, minorities were a small fraction of those admitted to medical schools in the late 1950s and early 1960s. This is of some importance because all people at sometime or another find themselves in need of a physician. If physicians choose to locate in areas of the country or within sections of a city that are not readily accessible to particular groups, it becomes difficult for these groups to secure proper medical treatment. In addition, if physicians have an aversion to treating certain groups in society, these groups suffer unduly. It was partially in response to these considerations that the Association of American Medical Colleges (AAMC) undertook a program in 1968 to increase the number of minority group members entering medical schools and, subsequently, entering the profession of medicine.

In 1968, at its annual meeting, the governing body of the AAMC adopted a resolution that stated in part: "Medical schools must admit increased numbers of students from geographic areas, economic background, and ethnic groups that are now inadequately represented."[12]

This was a significant attempt by the leaders in medical education to address the serious problem of the low numbers of students from minority and lower-class backgrounds in medical schools. It should be noted that the resolution quoted above speaks of both geographic areas and economic background as being of concern in the recruitment of medical school students. This is contrary to the impression often conveyed in discussions of the *Bakke* case, which have projected the impression that special admissions programs were addressed only to the problems of minorities. In actuality, medical schools were concerned that geographic area and socioeconomic status as well as minority-group membership be represented in future medical school classes on a basis more closely reflecting their percentages in the overall population.

Medicine has long been a profession attractive to the offspring of the well-to-do. The class that entered medical school in 1976-77 illustrates this well: approximately two-thirds of the fathers of these students were physicians or worked at other health occupations or were owners, managers, administrators or other professionals. The students' mothers followed a similar pattern, with approximately one-fourth in the occupations just specified. Black students, on the whole, were from families that were less likely to be engaged in the professions and were less likely to have high incomes.

Nearly half of the black medical students came from families whose incomes were less than $10,000; this compares with only 11.6 percent of the white students and 40.8 percent of the Hispanic and Indian students. Of all students taken together, fewer than one in six (15.8 percent) came from families whose incomes were below $10,000.[13]

Because of the intense competition for places in medical schools and the difficulty in choosing between many highly qualified candidates, medical school administrators are sorely tempted to make admissions decisions on the basis of some combination of grade-point averages and MCAT scores. Privately, some administrators admit that a quantitative admissions criterion is a defensive tactic used to minimize appeals from unsuccessful candidates and avoid costly lawsuits.

When one looks at comparative graduation rates for students with scores on the Medical College Admissions Test (MCAT) science subtest of 500 to 549 and 600 to 649, one finds them to be 93 percent and 95 percent, respectively, based on a sample of more than 75,000 students who entered U.S. medical schools during the years 1949 to 1958 and who were followed longitudinally through the fall of 1962.[14]

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[11] *DeFunis* v. *Odegarrd*, 82 Wash. 2d 11, 507 p. 2d 1169 (1973), vacated and remanded per curiam as moot—416—U.S. 312 (1974).

[12] Dario Prieto, "Minorities in Medical Schools, 1968-78," Journal of Medical Education 53 (August 1978): 694.

[13] W. F. Dube, "Socioeconomic Background of Minority and Other U.S. Medical Students, 1976-77," Journal of Medical Education, 53 (August 1978): 443-44.

More recent studies show that retention rates were even higher for those who entered medical school in 1968–69: 95 percent had received the M.D. degree by 1973 and an additional 1 percent were still in school; this represents a net attrition rate of 4 percent. Attrition rates for underrepresented minorities were somewhat higher, but by 1973, 89 percent had already graduated and 91 percent were expected to graduate eventually, despite having had relatively modest undergraduate GPA and MCAT scores. In addition, the first-year retention rate of blacks rose from 91 percent for 1971–72 first-year students to 95 percent for 1973–75 entrants.[15] The performance record is thus extremely good. Indeed, superlative.[16]

The latest data available from ETS on the race or ethnic identification of Graduate Record Examination (GRE) test-takers show that in 1975–76, 10.7 percent identified themselves as being black, Hispanic, Oriental, or Asian-American. Blacks and Hispanics alone accounted for 9.5 percent of the total test-takers. The 21,868 self-identified minorities who took the GRE in 1975–76 were compared with a total of 24,000 minorities reported in graduate school in 1973–74. Self-identified minorities increased among 1976–77 test-takers to 11.4 percent and blacks and Hispanics increased to about 10 percent. The total number of minority students who took the GRE in 1976–77 increased by 87 to a total of 21,781. Thus, while the total number of minority test-takers remained virtually unchanged from 1975–76, to 1976–77, the total number of test-takers who identified themselves by race or ethnicitiy declined by 12,000.

It is because of the stability of minority test-takers and the decline in the number of nonminority test-takers that the percentage of minorities in the response group increased. Those GRE test-takers who identified themselves as members of minority groups in the 1977–78 school year increased to 11.6 percent and the number increased to 22,503. Thus, while the number of test-takers increased by approximately 1,600 between 1976–77 and 1977–78, the number of minority applicants increased by over 700, accounting for more than 40 percent of the increase.

Reliable statistics on minorities in graduate programs are difficult to come by. Using test-takers as a proxy, the absolute number of minorities is either steady or increasing slightly and the percentage of all test-takers who are minority-group members is on the increase. One must be careful about drawing inferences from such sparse data, though it is hardly speculative to conclude that the potential pool of graduate students is likely to be made up increasingly of minorities.

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[14] Ibid., pp. 961–62.

[15] Ibid., p. 962.

[16] Prieto, p. 695.

TABLE 1.—MEAN UNDERGRADUATE GRADE POINT AVERAGES AND MEAN MEDICAL COLLEGE ADMISSIONS TEST SCORES OF APPLICANTS TO THE 1976–77 1ST-YEAR U.S. MEDICAL SCHOOL CLASS, BY RACE AND PARENTAL INCOME

Academic measure [1]	All applicants		White		Underrepresented minorities [2]		Black American	
	$10,000 or more	Less than $10,000	$10,000 or more	Less than $10,000	$10,000 or more	Less than $10,000	$10,000 or more	Less than $10,000
Undergraduate GPA:								
Number with known GPA's	31,089	5,101	27,139	3,191	1,725	1,238	1,249	899
BCPM GPA [3]:								
Mean	3.25	3.07	3.29	3.22	2.64	2.64	2.54	2.58
Standard deviation	.48	.57	.44	.48	.58	.58	.54	.57
AO GPA [4]:								
Mean	3.37	3.24	3.39	3.33	3.00	2.98	2.93	2.94
Standard deviation	.42	.48	.41	.44	.49	.49	.48	.49
Total GPA:								
Mean	3.30	3.15	3.34	3.27	2.80	2.79	2.71	2.74
Standard deviation	.41	.48	.38	.42	.48	.49	.46	.47
MCAT subtest:								
Number with MCAT scores	34,351	5,997	29,235	3,527	1,965	1,416	1,391	1,015
Verbal ability:								
Mean	545	510	553	548	466	438	450	424
Standard deviation	89	103	80	89	95	89	89	85
Quantitative ability:								
Mean	597	554	605	584	502	479	483	463
Standard deviation	95	104	83	90	95	92	90	85
General information:								
Mean	532	503	539	533	469	446	454	434
Standard deviation	74	84	65	76	74	68	66	63
Science:								
Mean	579	535	589	571	480	456	459	440
Standard deviation	90	104	76	86	97	53	90	89

[1] 68 percent of grades or scores lie within 1 standard deviation of the mean (68 percent of all applicants with parental incomes of $10,000 or more had BCPM GPA's of between 2.77 and 3.73).
[2] American Indians, black Americans, Mexican-Americans, and mainland Puerto Ricans. [3] Courses in biology, chemistry, physics, and mathematics. [4] All other courses.

Source: Bart Waldman, "Economic and Racial Disadvantage as Reflected in Traditional Medical School Factors," Journal of Medical Education 52 (December 1977): 963.

There is strong evidence of the continuing shift in minority student's interest. Of 11,086 blacks reported as takers of the 1977-78 GRE, only 2,656 specified education as their undergraduate major—24 percent. Even more telling, only 3,486 of the 11,728 blacks identified by gradute major were in education. This 30 percent share is in sharp contrast to the 60 percent share of all black doctorate recipients in 1973-74 who specialized in education.

From the data available two generalizations are possible. First, there continues to be a shift in preferences with respect to graduate field. with educaton declining in importance. Second, the interest of minority students in graduate education, contrary to that of the general population, has not waned. If anything, there is a growing pool of potential students from minority backgrounds. The statistical profiles of these students, as we saw in the case of medicine, are likely to differ substantially from the traditional graduate enrollee.

This poses a problem for admissions offices, which must determine if the statistical difference are indicative of differences in the likelihood of successfully completing graduate programs. In addition, it raises the question of whether these students would be as successful as traditional students under different conditions or instruction and support services. But if the medical school results are extrapolated to graduate success rates should be high (roughly similar to white candidates). Minority candidates present an additional problem to graduate and professional schools. Because of their lower family income they are in greater need of financial aid for admission and to continue.

CONCLUSIONS

The past decade has been an unusual one for minorities in higher education. The civil rights activities of the 1950's, and the 1960's civil rights legislation (1964-65), and the issuance of Executive Order 11246, as amended by Executive Order 11375 and applied to nonconstruction contracts including colleges and universities (Revised Order No. 4), have dramatically changed the climate of American campuses. This change, generated by the civil rights activities and prodding from the federal government, has produced greater awareness on the part of university administrators of the underrepresentaton of ethnic and racial minorities in their student bodies and on their faculties.

There has been a massive shift in the interest of minority students, particularly blacks, away from traditional areas of study. The greatest shift has been from education; there has also been a noticeable shift of smaller magnitude away from the social sciences—with the exception of economics—and into other academic areas and business administration.[18] There has also been marked growth in minority enrollments in medical and graduate schools over the decade.

The enrollment growth at both the undergraduate and graduate levels is likely to continue because of the increasing number of college-age minority youth and the decline in enrollments of white students. Thus, the college population for the next several years will contain a large proportion of minority students than in the past. A similar prospect is likely for the graduate schools which depend on the undergraduate pool for their students. Although total graduate enrollments are declining, minority enrollments are holding their own or gaining slightly and the percentage of minorities in total graduate school enrollment is edging upward.

What will happen to minority enrollment in professional schools, particularly law, medicine, and dentistry, is not clear. Minority students, on the average, present statistical profiles characterized by lower grade-point averages and lower Medical College Admissions Test scores than whites. Care should be exercised in interpreting these data. The attrition rate of lower-scoring students is only marginally more than it is for those with MCAT scores averaging 100 points or higher.

For the future there will be continued enrollment growth of minorities at both the undergraduate and graduate levels. In professional schools, a forecast is more hazardous. It will depend upon many things—rewards from college attendance, admissions policies and practices, and financial aid—to name a few. The demographics indicate a positive trend; but the admissions policies have an uncertain direction. What Congress does with respect to affirmative action will certainly affect the outcome.

Affirmative action in higher education is important for several reasons. First, our colleges and universities are the training ground for scientists, engineers, physicians, attorneys, industrial managers and other professionals. Second, higher education is a proven vehicle of mobility for youth. Third, by opening more jobs at the top for minorities we also create opportunity in the middle for those below. Fourth, highly educated people have lower unemployment and higher incomes. Lastly, the demographics are right and there is excess capacity in higher education.

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[18] The shift in minority enrollments in graduate schools of business is documented in Alexis, p. 12.

STATEMENT OF MARCUS ALEXIS, DEPARTMENT OF ECONOMICS, NORTHWESTERN UNIVERSITY

Mr. ALEXIS. Thank you. I want to address a segment of the market which has more or less been ignored in much of the discussion of affirmative action. I was happy to hear some attention paid to it by the questioning of the previous witness, that is the entire area of the professions, the highly educated and the highly skilled workers.

A great deal of the attack on affirmative action and none of the emotionalism has really come about because of the enrollment pressures in some of the professional schools which are the gateways to high-paying professions, particularly law and medicine. In two cases that aroused emotions, the *DeFunis* and *Bakke* cases, dealt largely, if not exclusively, with the questions that were raised this morning, questions of merit, qualifications "reverse discrimination."

These issues arise because the number of positions available in these schools is limited and as the number of individuals who seek to enter those professions is quite large relative to the number of seats available for first-year students. Those professions are foreclosed to anyone who does not have the proper accreditation.

I have been a university professor for 25 years. I must say some of my students who get into distinguished medical and law schools sometimes befuddle me. I don't know what the admissions committee had in mind. Some of those that should be window washers end up in the Ivy League professional schools and some of those that I think are brilliant don't get admitted.

To say that graduate admissions is an art rather than a science is to put it mildly. But it is crucial to be selected into one of these institutions if one is to realize this ambition.

The unfortunate truth is that there are many, many more young people who are "qualified" than there are spots. In the seventies, by any standard you wanted to use, by the average undergraduate grade scores, by their admission test scores, whatever you have to use, the students in 1970 who were being turned away were better than the students 20 years ago who were being accepted.

So that in fact what the professional schools were doing was rejecting very, very good students. I am told by experts in medical education that two-thirds of the applicants to medical schools would have no difficulty completing the course of study. They can over-admission to one-third so in fact they are rejecting half of the qualified students knowingly because they don't have any place for them.

One way of dealing with this question of scarcity and shortage on the part of the professional schools is to make it easy for themselves. It may come as a big surprise to you that professors, like other people, are lazy and what we like to do is to find an admissions procedure that will get us a class of the quality and size we want with minimum effort.

If you have large numbers of people knocking on the door with their fists full of money willing to pay and sometimes having their wealthy parent also offering generous gifts, it is not hard to find a way to decide who gets in.

One thing you can do is construct a little table and add up or combine somehow the grade point average and some score, and if you want to admit 250 people and you know you have a 50-percent rejection rate because these kids are sneaky, they apply to 10 places, so if you want to admit 250 you have to admit 500. You list them out and get 500 people send out the offers to them and just like clockwork you get 250 full-paying members.

There is no assertion that I know of that those 500 you admitted are any better than the 500 you rejected necessarily but it is a nice, easy way, and it has the additional period of being "objective" so that when you get sued by the aggressive parents of the unsuccessful applicant, you have something to fall back on.

You can say, we took the grade score average and multiplied by 200, we added to it the admission test score and we took everybody who had a score over 1,750. When the court looks at it you find that is exactly what they did and it is an easy system.

One of the unfortunate effects of a system of that sort is that if followed to its extreme it would greatly disadvantage and continue the underrepresentation of minorities in many of the professions.

That participation is important for a number of reasons but one of the important reasons is that a way of solving the problem of the lowest paid, least skilled minority employees is by raising the opportunities for them to fill jobs higher up in the occupational distribution.

If the better educated minorities do not have an opportunity to fill those higher level jobs, they will continue to put pressure on low-paid, low-skilled jobs and the effects are that it increases the pressures there and reduces both compensation and increases the unemployment level.

So that contrary to a good deal of what is said, while the problems of the lowest paid, most unemployed workers is most critical, attention ought to be focused throughout the occupational distribution on skilled occupations, focused on the professions, because it is by giving mobility to some workers that we create opportunities for the underclass to move up in the occupational distribution.

I would like to say a word about the question of reverse discrimination and also about the goals and timetables.

I think a good deal has been said about it but just for the record to point out that goals and timetables do not necessarily imply a fixed quota which is in some way inflexible.

It need not and it does not, and what it does it seems to me—there may be a rebuttal presumption, a lovely word I picked up when I was a Commissioner at the Interstate Commerce Commission, which is used by lawyers often and it is in administrative practice and contained in some legislation.

For instance, in the Staggers Rail Act, which this Congress passed just last year, there is a trigger at which certain freight rates then become suspect and when they crash through that barrier there is a presumption that the rates become unreasonable and, therefore, become illegal. But that those railroads who can justify the relationship of rates to cost can remedy the situation, so that while the presumption is that the rate is unreasonable, it is rebuttable.

It seems what we are saying in the case of some employment situations is when you know the characteristics of a project, you know what the labor pool is like, and you see that there is a great disparity between what one would expect and what one sees, then you will say that there is reason to believe that this situation could not develop unless there was some systematic process going on which prevented minorities and women from being represented in larger number.

That, it seems to me, is a very reasonable position to take.

I would like to conclude with some illustrations from sports. I appreciate Dr. Anderson referring to the caboose and the engine and since I spent some time at the Interstate Commerce Commission it makes me feel a little more at home. It is my testimony since I left the Commission.

But in the area of sports very few people remember that the National Basketball Association, which now "suffers" from the problem of being too black a sport, did not have a single black basketball player until 1956 when George Sweetwater Clifton was taken on by the New York Yanks.

There is a sport in which having grown up in New York where every kid is born with a basketball, the question never was a question of talent and the opportunities unfolding and then what economists would call the supply side response—it is a different supply side than the one this administration talks about—but the surge of talent when opportunity presents itself is clearly evident in a number of areas.

I have tried in my written comments to suggest to you what has happened even in higher education. As opportunities have moved away from traditional fields for blacks, away from public school teaching, social work, the clergy, the changes in courses of studies of black students which I look at particularly, has been tremendous and overnight.

Now we find in many predominantly black schools just as we find on white campuses, that the No. 1 interest of these students is in economics and in business administration which was not true a decade ago when fields like education and social work dominated.

So these opportunities that are there do have a significant effect on the employment aspirations of these young people and having a public law there does also mediate and in some ways influence the attitudes or positions of corporate decisionmakers, that it very well might be taken as a signal that the Congress does not believe that any attention should be paid to the plight of minorities if significant watering down of the laws that deal with protection of minorities in employment and affirmative action are permitted to go through.

Thank you.

Mr. HAWKINS. May I first express my personal appreciation to both Dr. Anderson and Dr. Alexis for their responding to the invitation to appear before this committee and also to pay a tribute to their contribution over a period of many years, as a matter of fact, several decades, to the advancement of economic thought in this country.

I would like to assure them they were invited not as a reaction to the statements of another economist, Mr. Thomas Sowell of Stanford, whom I do not know, but I am delighted to know their views are somewhat different from his.

I recall it has not been very long ago that Stanford University did not have a single black on its faculty and it was very difficult. I recall the first black student who went to Stanford because he happened not to be black in complexion and got in through a subterfuge. So at least through the great struggle in the field of civil rights, we now have an outspoken voice in Stanford even though he may differ with us as a result of this struggle.

I would like to address, however, a question or two to either one of you or to the two of you in terms of the present light of minorities and women in reference to the use of such weapons as affirmative action and systematic discrimination.

The best way to state it, I guess, is in terms of my understanding of lack of labor market participation of black males in the active years between 25 and 54. I think Dr. Alexis referred to the occupational distribution of blacks in the labor market.

It would seem that much has been lost in the decade of the seventies by minorities and by women as a result of increased discrimination and despite gains made in a few instances in the higher brackets, the vast majority of blacks did lose in the seventies what primarily had been gained in the sixties.

Several of the means of reversing this it would seem to me would be the ability to use systematic discrimination in addressing the problem. The mere absence in various fields of a substantial number of blacks or women is certainly a great indication of past discrimination.

Assuming that the proposed changes suggested by the administration that we cannot address these problems except on an individual basis depending on single individuals being complainants and being able financially and otherwise to come forth and to prove discrimination rather than being able to tackle the inadequate participation of black males for whatever reasons—and I won't get into that this morning—in certain fields other than basic industries but not in professional positions, not as managers, and so forth, if discrimination as such and if affirmative action as such are both weakened will the downward trend that we now see developing continue and are building, therefore, an underclass of blacks and women that will be irreversible perhaps during a full decade?

Mr. ALEXIS. Let me respond.

Mr. HAWKINS. What are the alternatives if we don't have affirmative action? What is left?

Mr. ALEXIS. You have asked a mouthful, really, in the question. Let me try to give you some pieces.

During the seventies, I think we have to be very careful when we say progress was lost. In a sense all work is lost in the seventies because of the sluggish level of the economy so the potential for growth and advancement that was lost is lost forever because those experiences were not gained, those jobs were not filled, those products were not produced.

The second question has to do with the issue of where one places the burden. It is actually an old administrative law gimmick to shift this enforcement burden from one party to another. Where you place the burden greatly affects the outcome. That is why lawyers are very concerned about where the burden is. What these changes will do very clearly is to shift the burden to those least able to bear it the discriminated against employees and also extend the time of adjudication.

If there is a real concern about the equity and the administration of present law then that question ought to be addressed directly rather than redressing this whole balance that exists in current legislation and in current rules.

Even some of those who complain about the onerous burdens employers face say they wouldn't want to do anything to upset title VII employment, Executive Order 11246, contract compliance. At least that is some of their rhetoric.

But I would be very suspicious about efforts which would shift that balance of burden in a sense from the class of employees to individual employees having to make their own case.

Then you raise the question about systematic remedies as opposed to these individual ones. It is clear to me where there is a general finding—and I think in the case of minorities that finding has been reached.

Even critics of affirmative action are hard pressed to deny that there is this legacy Mr. Hooks talked about of discriminatory practices in various sectors of American life.

The question then is how to offset that legacy and move quickly toward a position when the opportunities facing minority and majority people will be equal.

The affirmative action changes that are being recommended certainly would set that back. It will not advance that process at all. Two things that have nothing to do with legislation that would advance it greatly would be a healthy, vigorous growing economy, and as the previous witness said, even Wall Street is not excited about the performance of this economy and its forecasts for the future is not bright either.

Perhaps initiatives coming from the Congress which would take away some of the defects that are forecast would certainly be a step in the right direction.

That is important for another reason. It is not only because of the caboose story that Mr. Anderson talks about, but in periods of high employment and generally rising wages, the electorate is much more compassionate and generous and its willingness to undertake and to support equity measures is much greater.

If you look at the period of American economic history when the progress of minorities has been greatest, it has been greatest in periods of great economic upswings. It is not just that we move fast with the train but in effect they have in a sense moved forward. Their relative position, as well as their absolute position, has improved.

I think the economic and political climate is somewhat at issue here and the really sluggish state of the economy—many white workers are badly hurt now, too, and they are looking around to find a victim, a cause, and they are being told if these minorities and women didn't have this advantage, their chances would be better.

The truth is their chances would not be any better or not enough better to make a difference in their lives.

This appears in this period to be an additional hinderance or friction in the market.

I would argue that it is not because in many respects these workers are not what economists call close suits in any case.

Mr. **Hawkins**. Using the illustration that you did of the train with the caboose being attached, would you say that it is appropriate to use this in terms of what did happen to blacks during the seventies in which the relative income dropped from roughly 60 to 57, as I recall, of the whites, that the caboose—you would assume the train moving forward you would assume the caboose would mean in a relative position with the engine but it appears the caboose has broken loose and has lost a few wheels——

Mr. **Alexis**. It is on a very elastic chain.

Mr. **Hawkins**. So that the possible use, then, of macroeconomic policies attacks the proposal we have and monetary policies with the elimination of structural programs, including affirmative action as well as jobs programs, training programs and so forth, just simply means the caboose is not going to catch up with the train even if it begins to move forward, there will be some forward movement among blacks but blacks will still be relatively left behind.

Mr. **Anderson**. This is the point that I was trying to make, yes, about that, and that is to say that one cannot simply depend upon these salubrious economic forces working through the economy at large to improve the position of blacks and other minorities. The economy doesn't operate like that.

During the seventies, if I am not mistaken, there were created more than 20 million new jobs in the American economy. The American economy's capacity to produce new jobs was, if anything, the wonder of the Western world. The British were envious of the American ability to create jobs.

If you look at the unemployment rate among blacks I believe you will find in 1980 the unemployment rate was higher than it was in 1970 so despite all the new job creation, the black community as a whole was relatively worse off as measured by the degree of its joblessness.

There is another interesting part of that experience. If you look at what happened during the 1974-75 recession which at that time was the worst recession this country had experienced since the thirties, there was a more rapid rise in unemployment than among whites, that is to say, the black unemployment rate went up very rapidly and it reached a very high rate.

We had a little blip in 1976, in the latter part, when Mr. Carter came in with his economic stimulus program, it started to move a pace. But the interesting thing was black unemployment never really recovered from the loss that occurred during the 1974-75 recession.

Black unemployment among youth never recovered and today it is closer to 50 percent than it has ever been.

What this suggests is that there are some very strong undertows, structural elements in the economy that do not seem today to respond as much to change in the overall posture of the economy as might have been the case in the past.

So I disagree with Marcus a little on this. If you look at the fifties and forties and a specific rate of economic growth and see blacks were moving along. Today that doesn't seem to happen to the same degree it did before so I think there is even more reason to have structural programs, together with a macroeconomic policy—and I am not convinced, Mr. Chairman, I will be perfectly frank with you, this economic policy is going to work.

Take any part of it—it may be OK but when you put it all together it is a quagmire of policy that I think will be devastating to the country. The rate of interest will remain high for a year or so. That is for another hearing.

There were some growths within the black community during the seventies. Blacks who were college educated, who were able to move into professional and managerial jobs did reasonably well during the seventies. In fact, if one takes a flight to Europe in the summer or to the Caribbean in the winter you can hardly find a seat on the plane for middle-class blacks doing well economically. But that represents a small part of the black community as a whole.

Further, in final response to your question, there is a group within our society that made absolutely no gain during the seventies and that is the black female-headed household in which today, Mr. Chairman, almost half of all black children under the age of 18 live.

We have a situation in which that group is growing very rapidly. We have a situation here in which the future generations are going to be severely jeopardized because of the high rate of poverty among those households and I can think of no natural forces in the marketplace that would ordinarily improve the position of the black female headed-household.

The economic recovery program will not help them. Keeping the constraints on is not going to help them. Cutting taxes is not going to help them. One needs a structural program aimed specifically at that group.

To say the rising tide lifts all boats, what that misses is the rising tide does nothing to help the shipwreck at the bottom of the sea. That is the part I want to look at. Who is left behind when the economic growth moves ahead and the fact is a disproportionate number of economically disadvantaged blacks and other minorities simply do not benefit from the kind of economic growth that we have promised.

Mr. ALEXIS. May I add something to that?

Mr. WEISS. Please.

Mr. ALEXIS. What has happened structurally now that the question has been raised, what made the seventies different from other periods were, [1] an influx in unprecedented numbers of women into the labor force; and [2] that we have now the first period really since the end of World War II when we have had a very large immigration.

Those two events together create a great deal of competition for many of those jobs that minorities, particularly blacks, would have been opting for.

In some respects their failure to advance the way Bernie talks about is because they were crowded out.

The other thing that is really very important to notice is that those 20 million jobs that were noted, of them very few were created in traditional industries such as manufacturing, construction and the well-paying industries for semiskilled and unskilled workers.

Where the jobs are created in low-paying, low-productivity services, fast food joints, to put it directly, and those are not the kinds of jobs and that is not the kind of growth in the economy that is going to offer much in the way of economic advancement for lower income people.

So not only the economic growth per se is important but the kind of growth you get. I agree fully with Dr. Anderson that there is nothing in this Christmas tree gift bag that the administration got through Congress that assures poor and not well-off people will gain at all from the economic changes that were wrought in the budget and tax bills.

That economic program is one which will enhance the opportunities and the economic position possibly of the affluent and is a real gift to the rich.

I think this was at a very substantial cost changing economic incentives and rewards. What structurally has taken place has not dealt with the kinds of problems in the population this committee is concerned about.

Mr. ANDERSON. I would like to make one comment in the individual case versus class action.

I would argue it is more economically efficient and cost effective to pursue a class action strategy than an individual strategy. If one pursues the individual strategy doesn't there have to be more investigators, more people from Washington and other cities going out checking every plant?

If the enforcement agencies can pursue a class action strategy one individual case can trigger a company-wide investigation in which all members of the affected class would benefit from the remedy and that should be on balance a cheaper way to enforce the policy than to work through the adjudication of individual grievances.

Mr. WEISS. A distinguished member of the other body commenting on the proposed cutback on mine safety inspections suggested that, [a] unfortunately there will always be accidents in mines and; [b] inspections really have little to do with preventing accidents, that better labor management regulations are what you need.

So I suspect by analogy the argument they are going to give you is you don't really need more investigators or more lawyers or whatever, what you need is better attitudes and they will be generating those better attitudes it says here.

Mr. **Hawkins**. If you will yield one second I have an appointment to go down to the mall to defend the Job Corps program and I will have to absent myself for 20 minutes to do so.

I want to make that explanation so Dr. Alexis and Dr. Anderson will not feel they have driven me away. I do regret this. I would like to express my appreciation to both of them and also to you, Mr. Chairman, for filling in today and I will attempt to get back just as rapidly as possible.

Mr. **Weiss**. If I may, on the basis of the economic analysis that both of you just gave with regard to the people at the bottom of the sea, if you will, take into account the elimination of the CETA program for the most part whose participants were predominantly those people at the bottom of the economic ladder, the elimination for all practical purposes of the disregard in outside earnings for those people receiving aid to dependent children benefits, the elimination or reduction significantly of child care assistance, the cutback in tuition assistance programs for many of the single parent family women heads of household who are beginning to attend in large numbers the community colleges and other educational institutions, is the issue of affirmative action at all relevant or germane to the plight of those people.

Mr. **Anderson**. Let me try to answer that first and I am sure Marc can add to it.

I see affirmative action as a set of procedures designed to assure that all individuals who are qualified for specific available jobs have an equal chance to compete for those jobs. That is the way I see affirmative action. I don't see it as a mechanism through which individuals who are unqualified for jobs are forced into those jobs in preference to individuals who are more qualified for the jobs.

Taking into account what Mr. Hooks said earlier about qualifications, I don't know that I go quite as far as that with respect to qualifications. There are some reasonably good criteria by which individuals can be measured.

I see affirmative action as being a set of policies that assure all individuals who have qualifications to perform a job are considered for it.

For many of the people who are served through CETA, the qualifications are not at a level where they can adequately compete on a fair basis for the available jobs so then CETA is a way of bringing them up, it is a way of increasing their potential to be competitive in the labor market and thereby expanding the opportunities for them to increase their employment and reduce their dependency.

So to the extent one is pursuing an affirmative action policy on the one hand and CETA on the other hand, if you then eliminate the CETA programs which contribute to the development of employability, you then are saying that those individuals will perpetually be left behind and there will be no recourse available to them, no resources for them to build up their ability to compete in the labor market and the result is that they will fall farther and farther behind.

That is the way I analyze the relationship between the two.

Mr. **Alexis**. There is nothing Dr. Anderson says I would disagree with.

Much of the acquisition of skills that people have is not gained by going to school. You get generally schools' reading, writing, and so forth, and though I am an educator, there is a great deal that is structurally wrong even with our way of viewing things.

One of the things that struck me years ago is how little we spend on vocational education in our secondary schools, how little we spend for preparing for productive work young people who are not going to college.

Our whole educational slant is toward that 25 percent that is going to go to college and get 80 percent of the resources. Even though I am a college professor I think that is an unfair way to treat those who are not going to go to college.

Industry does a tremendous amount of training. One thing that affirmative action does, even for the person who has not acquired skills, if you want to be a carpenter it is very hard to learn to be a carpenter by doing it, people want to be machinists and some of these are very remunerative occupations.

If you want to operate the big earth-moving equipment, I don't know of a high school that teaches you how to do it. You acquire that skill.

For generations industry has taught people or given them those skills and one of the things that affirmative action does for many minorities who would otherwise be in low-paying jobs, it creates an upward pressure on employers to make those opportunities available so that one doesn't simply have the skill presently but—they are comparable to the whites who have those skills.

I met a person once who was a film emulsifier coater or something of that kind. Eastman Kodak has machines that make a million feet of film a day. There is no place in the world where you could learn to coat film except in a plant like Eastman Kodak's. Nobody else makes film that way.

In the economy of the sixties that company advertised throughout—paid relocation expenses and taught people skills specific to their plant. That goes on characteristically in American industry.

I think that another way of looking at the problem of the average minority person is to have the opportunities to be considered and to be trained for these kinds of positions rather than to have them foreclosed. That would be an important advancement.

The other problem are the female-headed households. To give you the magnitude of that problem, I looked at it before I came into the Government. Four out of 10—he talked about half the children in black America are raised in those households but 4 out of 10 black families is headed by a female.

In addition, two-thirds of those households are in poverty. They account collectively between them for maybe a third of all black poverty.

When you look at white poverty they account for a miniscule amount of it, under 5 percent. So I think when one looks at these problems you have to understand the structural and demographic differences between the white population and black population.

The birth rate among blacks and hispanics is higher than among whites so you are going to have more children in these households. They are going to be affected differently than you will have if you are thinking about childless two-couple working households.

These problems have to be addressed by a program specific to those problems.

We also need generic or systematic solutions to the overall problem of using race is a factor in affecting people's occupations and their incomes.

Mr. Hooks said he had very nice shoes on. Mine are not as nice as his but in my employed life I have been fortunate to have some very good positions. However, there is no doubt in my mind that being black has limited my opportunities. There is no question about it.

I know many white people who are less talented who have done much better. It wasn't simply because they were better looking. It is a factor up and down the scale.

Mr. **Weiss.** I assume what we are saying is that in order to deal with the problem in its totality the affirmative action program is essential, but if you don't have the opportunities for people to be employed to begin with, the affirmative action program by itself for that sector of our population is not going to mean very much.

Mr. **Anderson.** I would agree entirely with that construction of the issue.

The point that I would like to make is exactly that, that affirmative action must be seen as a vital part of any effort to improve the conditions of opportunity, the life chances of minorities, and possibly also women in this society.

Let me be candid with you and say if you look at the statistics very carefully—and I would not want my statement to be misinterpreted—there is reason to conclude that majority group women have made greater economic progress than minority groups during the 1970 period.

I think that further emphasizes the point that Dr. Alexis made, that is, race continues to be a very important factor in eliminating the opportunities for a substantial number of people in this country.

But I would say that you need affirmative action policies and practices and procedures and regulations in order to assure that the groups that have been excluded in the past, including minorities and women, continue to make the kind of progress that they have made and make even more progress.

There is nothing in the operation of the economy that will produce those kinds of gains.

If you have simply the operation of the economy without affirmative action, without special effort, you will not achieve an improvement in the relative position of these groups.

On the other hand, if you try to have affirmative action without the economy moving along progressively and at a satisfactory rate, first of all, I am sure that would not be politically feasible because what would happen would be that you would be trying to redistribute a constantly shrinking pie and that is simply not politically feasible in this country but even if it were feasible if people would stand for it, it would not accomplish the objective.

So I see these two as working hand-in-hand, being absolutely essential, not just aimed at the better off. There are those who say affirmative action only helps those who would advance anyway. That is not true. Every time a black or hispanic or other minority who is qualified for a better job gets into that job, there is another place for someone to come into the job that first person vacated.

So unless we see affirmative action as operating all along the line we would be limiting the opportunities for minority and for women but I think we have to see these two as being essential.

Certainly if we look at what we are likely to have—my estimate is the rate of unemployment will rise over the next year, that it will rise above 8 percent and then begin to decline.

There is all the more reason in that type of environment to have affirmative action. In order for business firms to continue to be sensitive to finding those ways voluntarily in most cases to try to cushion the blow on these protected groups who in the past have been denied opportunities—if you simply drop the affirmative action I suspect you will have a situation even worse than we experienced during 1974–75.

Mr. WEISS. Assume the administration follows through on the path that Mr. Reynolds outlined here yesterday, take the kind of company you outline in your dissertation and in your testimony, do they continue to adhere to their policies or is there a possibility they will decide since nobody else seems to be doing it they will not adhere to it either?

Mr. ANDERSON. No, I think their system is in place. I have not looked at A.T. & T. closely, although the followup study was done by my colleagues at the Wharton School.

There is a system in place in the Bell System that will continue to select out minorities and women for a broad spectrum of job opportunities.

My own expectation is there will not be the relative gains between 1980 and 1985 as there were between 1975 and 1980, but I don't think that they will go back to the position that I discovered in 1968 and 1969.

Mr. WEISS. Take somebody like Sears, Roebuck which was in the middle of an investigation and subject to some orders on systematic nonaffirmative action. Then the new administration comes in and says, don't worry about that, we are going to have to prove in fact you discriminated on an individual basis.

What happens to companies such as Sears which have not been put in the process?

Mr. ANDERSON. There is no incentive for them to put it in. It is very costly for a major multiplant company to put in these systems. It is costly. I would not doubt that A.T. & T. paid an enormous amount to put this system into place.

So unless there is pressure generated by the Federal Government or other enforcement agencies to see that these systems are put in place, the incentives would be not to put them in place. That does not mean this company is going to discriminate but simply they would not develop the kind of systematic changes that would over some period of time lead to improvement in the position of these groups.

I think it would be very harmful, quite frankly, to send out a message at this time that the development of these kinds of systematic ordinarily means for assuring equal employment opportunity is no longer necessary because there would be a tendency to drift back into the old ways and I am not convinced simply recruiting does anything.

Why is it when it comes to affirmative action and equal employment we say you can't measure progress by the numbers? We measure progress by numbers everywhere else. Why don't we measure progress by the numbers now?

The fact is I happen to work for an organization that is in the business of making grants. They give away money. My success is measured in part by the numbers. When I was at the university for 10 years, every year the dean wanted to know how many students had been in my classes and if the classes were too small that was a bad mark against me. Maybe I wasn't doing a good job teaching.

In every aspect of American life we measure progress by numbers but when it comes to assuring equal opportunity that is wrong and I think that is nonsense.

Mr. **Weiss**. Dr. Alexis, in the same way what do you project as happening as far as career professional selection is concerned assuming the administration follows through?

Mr. **Alexis**. I think you are going to find a mixture depending on what kind of industry. In some high-technology industries, for instance, silicon, where the chips are made in California, that technology changes so rapidly and the skills are so special that they may not care if people have three heads and nine arms as long as they can make a contribution and keep them ahead of the market. That is important.

Where intense competition exists you may not find problems. But in those areas in which there is a lot of interchangeable people of roughly equal ability and there is some slack in the system in which there is the level of unemployment Dr. Anderson referred to which is clearly within the realm of possibility—certainly within the range of 8 or 9 percent or even 10 percent is not an unreasonable prediction for the next 12 to 18 months and then a backing off from it—coupled together with a signal from the administration that people can do what they feel comfortable doing in terms of the issue of employment of disdadvantaged people, minorities, women, and others. The employers then have no incentive to incur the costs of such a system.

There may be employers who feel they can get a jump on the market. If everybody else isn't doing it I should do it because I can get all this talent cheap. Some people may do it out of self-interest. But there are not enough of those blue chip Silicon Valley outfits to employ everybody and not enough smart managers to figure they should capture the talent early so the net effect can be more pressure on minorities should the administration be successful.

You don't have to make the statement that the employers are discriminators, that they are evil, terrible people. All that is required is that they choose the path of least resistance.

If I have a plant and I have 2,000 employees in the plant and they all come from a particular part of the city of Chicago, one that happens to have no black people or hispanics, and they can supply me with a steady stream of their relatives—when a job opens they tell a cousin, and that person is a reasonably good worker, and I look at the income statements every week and I am making money, I wouldn't care if they had chimpanzees out there working.

That is the mentality of much of management. They don't care who produces as long as they produce at a cost that makes money for them. But they will not interrupt a selection process which systematically excludes some workers because they don't care. There is no profit to them in changing the selection system.

Affirmative action is important in those instances of indifference as well as of those where there is active venal kinds of discrimination.

I want to make it clear that I think you need it for the people who are not discriminators too.

Mr. Weiss. Thank you.

Mr. Washington.

Mr. Washington. Thank you.

Dr. Anderson, first I regret I was called away and I missed your original presentation but I have tried to read it. I welcome both of you.

On pages 5 and 6, Dr. Anderson, I think you very effectively answer some of the false criticisms of affirmative action people who claim affirmative action is designed for elitist groups and it does not help the masses.

In light of the fact that you separate the two, that affirmative action is designed to help those who need training, such programs as CETA could probably accomplish that, it is my understanding next year we will be rewriting the CETA program.

What would be your recommendation as to a linkage between affirmative action and these various federally funded training programs?

Mr. Anderson. One of the things about CETA in the past has been the relatively low rate of takeup among employers of OJT despite the fact that most people in this labor market learn their jobs on the job.

I would like to relate three things. First of all, much of the cut in CETA, as I understand it, came in the public service employment segment although CETA has been cut in half. That leaves the employable development activities, skills, training, perhaps some of the other activities, but the major emphasis seems to be on the private sector, that is to say, that everything I have heard suggests that a major effort will be made to increase the private sector's role in CETA or whatever comes after CETA.

This would be a golden opportunity to link up employment and training activities with affirmative action because if the private sector's role is going to be expanded, I assume what that means is that the private sector would be making more jobs available to economically disadvantaged people.

If it doesn't mean that then I don't understand what is meant by expanding the role of the private sector. If it does mean what I have suggested then it will be all the more important that in expanding job opportunities for the economically disadvantaged, that be done within the context of goals and timetables aimed at including minorities and women across the broadest range of occupations being made available.

There is another part of the linkage and that is that CETA programs should be operated with a fair amount of affirmative action and in many cases they have not. If you look at some employment and training programs under CETA, you will find a relatively limited participation of women.

You will find in some areas a limited participation of minorities although in the youth programs I believe about 50 percent of all participants were black youth.

That was largely the result of the targeting requirements imposed in 1978.

But I think if we are moving toward a set of programs or policies for employment and training, call it what you will, CETA or post-CETA, that could very conveniently be linked with affirmative action goals so that the firms would be able to achieve their affirmative action objectives while at the same time expanding opportunities for the economically disadvantaged.

Mr. WASHINGTON. Would you assume then that the various industries would provide the range of skills to be taught for these Federal-funded programs?

Mr. ANDERSON. My realistic expectation is that to the extent that employers open up more jobs for the economically disadvantaged, they will not be among the better jobs in the firm. I have in mind the experience under the NAB jobs program back in the late sixties, early seventies.

I would hope that the broadening of employment opportunities in the private sector would not be disproportionately concentrated in the lower level dead-end, make-work kinds of jobs in industry.

That is interesting because public service employment is said to be make-work as if to suggest also to make work in the private sector. I have never heard anyone in the private sector say it publicly but there are many make-work jobs in the private sector as well.

Given the characteristics of the groups that are served by CETA—and I have to be honest with you the typical CETA participant is not a high school graduate, has limited work experience, has limited basic educational qualifications—there will be relatively few jobs in most technologically oriented companies in which a person with those kinds of qualifications could be hired and trained. I think what you are likely to get is a broadening of opportunities at the entry level with the firm committing itself, hopefully, to a longer period of orientation and adjustment of the employee on the job hopefully with some cooperation from community-based organizations and others to help acclimate that person to the private sector employment.

It will not be easy but I don't think any rewriting of CETA is likely to result in a significant increase in CETA- eligible members of the labor force in the Silicon Valley kinds of jobs Professor Alexis mentioned before.

I have never seen evidence of that happening throughout the manpower period, and I have been studying manpower programs for the past 15 years. I don't want to be over-optimistic about what might happen.

The other point I would make is that a disproportionate number of the jobs created in the seventies were in the services industry and there are more opportunities likely to be created in those industries over the next 5 or 10 years than in the manufacturing and durable goods type industries.

We don't have as much information on the characteristics of employment in the services industry. We know that the structure of employment there tends to be different. The opportunities for upgrading are very different from what they are in the manufacturing sector. But it very well may be that there will be more jobs created for CETA-eligible persons in the services industries as a result of linking affirmative action with post-CETA than in the manufacturing and other durable goods industries.

Mr. **Washington**. Would you wish to comment, Mr. Alexis?

Mr. **Alexis**. Yes. I would say that the growth is likely to continue in the service industries. It is interesting that while America's trade balance has reflected these deficits and while employment as a percentage of total employment has been decreasing in the United States, the consumption of manufactured goods hasn't fallen relative to the incomes of Americans.

What we are doing is buying them from overseas. So to some extent what we are doing is exporting the kinds of jobs we used to have available which people could aspire to who were intelligent, industrious. So that is shrinking somewhat.

Many of the service jobs are not well paying and there is also a temptation to further automate those jobs, to subdivide them and to make them have less opportunity for growth unless one is talking about managers.

Therefore, you are talking about a jump from a class of individuals who are really very similar in terms of low level skills and few job opportunities to some supervisory group.

What we are also seeing in the service industry in things like fast foods, those jobs are also being further satisfied and there is a growth of a part-time market. Interestingly, a lot of the female employment is in part-time jobs and some of the occupations are relying on these workers in some cases because firms find that by not hiring people themselves they can escape some of the provisions of Federal law if they hire the service for trash removal, and so forth.

Part is a managerial decision about supervision and some of it is an attempt to minimize the kinds of costs.

That sector does not seem to me to hold great promise for upward mobility.

Also, the world is becoming more open in terms of competing directly and, therefore, we have the phenomenon of Japanese automobiles. I was reading in the business press recently if the Japanese have not communicated to the administration they have not made any secret to the rest of the world they have no intention of cutting their trade surplus.

Some people think it is at least as good a car. It certainly is going to create pressures on those kinds of automotive and steel industry jobs.

In dealing with the problems of the poor, the underclassed, it is not to look for a magic cure, a single purpose cure. Americans like the quick fix. We like to find something that will solve our problems all at once.

There is a magic supply side economics, monetarism, the moral majority, whatever. So we look for these single strategies and we gamble heavily on them. If they don't work we swing with something else.

I think the problems we are talking about really need an arsenal of many weapons to attack. We have to see whether the same medicine that will be successful in treating the problems of the female-headed household are going to be useful for the non-English speaking immigrant, for the inner city youngster who does not acquire a good formal education, and these may be subsectors which may have to be treated somewhat differently in order to reduce acceptable results.

I would like to say one thing about the high school graduate. I am not as expert in this field as Dr. Anderson. When you talk to employers about the high school certificate, the ones I have talked to don't believe it means a better worker in the sense of being able to do a better job. They look upon it as evidence of discipline that somebody can complete something, that someone has learned to be able to get to school enough days a year to get through and has not gotten into so much trouble that he got expelled.

They are looking to the schools to give a signal that this is not the worst of the lot. If the schools could be made to also perform better in their job preparation, vocational education, for instance, I think we could do a lot in the school system. They are playing games.

The city of Chicago is more interested in avoiding the issue and spending large sums of money to not educate poor people than it is in trying to make them competent, self-sufficient and able to go out and do something in life without becoming a potential recipient of public aid.

I think we have to put pressures on other public institutions as well as private employers.

Mr. WEISS. Dr. Alexis and Dr. Anderson, thank you very much for very important and provocative testimony. We are very grateful to you.

Our next witness is Mr. George Sape.

Mr. Sape, we appreciate your patience and perseverance. We have your prepared statement which, without objection, will be entered into the record in its entirety and you may proceed as you deem most appropriate.

[The prepared statement of George Sape follows:]

PREPARED STATEMENT OF GEORGE P. SAPE, VICE PRESIDENT, ORGANIZATION RESOURCES COUNSELORS, INC.

Mr. Chairman, members of the Subcommittee, my name is George P. Sape. I am Vice President of Organization Resources Counselors, Inc. (ORC) a world-wide management consulting firm which specializes in the areas of employment relationships and the utilization of human resources. Our work requires that we assist employers, both public and private, to design, review, and improve the systems and procedures which they use to manage their employment processes, and to assist them in solving problems and implementing various portions of their personnel management procedures. Our work, therefore, touches upon the various areas of personnel management, and ranges from review and assessment of the effectiveness of a corporate organization and structure to manage people, to the evaluation of specific management personnel practices. We also strive to be sensitive to new trends and concepts in personnel management and to be responsive to the techniques for implementation of programs and practices required by governmental and regulatory requirements.

To this end, we work with management in various specific areas such as domestic and international compensation, occuptional safety and health, labor-management relationships, employee attitudes and productivity, and training and development. Our clients tend to be prodominantly large corporate organizations or agencies of either federal, state, and local governments.

One major area of our consultative work, involves equal employment opportunity. In this area of employment relationships, we provide consulting services to 210 of the nation's major employers who are representative of every major segment of American business and of all areas of the country. In this regard, I feel that ORC has both wide-ranging experience and a broadly based perspective on the effects of EEO programs. We gain our perspective and expertise by a continuous interchange with the appropriate Federal and state agencies having EEO responsibility and by ensuring that we have a regular and continuing interaction with our client companies through an ORC activity called the Equal Opportunity Group (EOG). The EOG is an ongoing activity through which we meet regularly during the year with the management representatives having key equal employment responsibility within their companies. Our meetings, which are conducted in a series of small roundtables sessions, are held to discuss current developments and requirements in the equal employment area, to exchange information on current issues and concerns, to examine governmental and judicial initiatives, and to examine and analyze the gains and problems experienced by employers in attaining their equal employment objectives.

This continual and regular contact with this large number of major corporate organizations provides us with a good cross-section of the successes and failures that businesses experience in grappling with the multitude of problems encountered in implementing equal employment programs. It has also provided us with a good historical and evolutionary picture of EEO progress among major U.S. employers, and, I feel, a good perspective on the future needs of EEO as part of a broader corporate management program.

It is within this framework that we are pleased to present our testimony to the subcommittee today in its continuing oversight hearings on affirmative action and equal employment. ORC is not a law firm, although we have lawyers on our staff, and we are not a trade association. Accordingly, we will not seek to present to the committee a legal analysis of current EEO problems. I am certain that the committee will hear from lawyers representing all sides of the issue. We also will also not seek to speak for one industry or industry group, although it is fair to state that our perspectives are probably more reflective of large rather than smaller employers.

I feel, therefore, that where ORC can be helpful to the committee is in presenting a management perspective of the issue of equal employment opportunity as it is reflected in one cross-section of American business today. By necessity, our testimony presents broad ideas and views in order to provide the committee with as wide a perspective as possible within the time and limits of this hearing. In areas where the committee may wish additional material or a further explanation, we would be pleased to accommodate its needs, as possible.

COMPANY IMPLEMENTATION OF EEO

The best way to appreciate the management perspective on equal employment issues is, I feel, to understand one thing about American business leadership. Executives are by-and-large practical people. Their interest is to produce a good product, to sell that product, and to make a profit for the company. To this end, anything which negatively affects the ability to attain these objectives is viewed at best with suspicion, or more likely with opposition.

This practical approach to business objectives is virtually beyond political motives. In equal employment opportunity, perhaps the best way to demonstrate this fact is by an example. Some months after the current Administration has been installed in office, and as various press reports began to appear about what was being characterized as a wholesale retreat from equal employment and affirmative action issues by the Administration, I received a telephone call from the president of a large company who was concerned about these reports.

His concern was based upon a very practical issue. The sum of his concern was that these reports would hurt the employee relations climate at his company which could, in turn, affect his business. As he noted, the company had an integrated work force. This integration had been achieved under various company affirmative action programs over several years. The company had progressed to the point where the president felt comfortable that his multi-racial, male-female work force represented an inevitable and desirable long-term integration within the company.

Now, however, with the reports circulating widely about the dismantling of equal employment and affirmative action, he was concerned about the effects that these would have on the morale of minority and women workers who constitute a significant portion of the work force. To the president, the concern was specifically that employees would assume that affirmative action at the company would come to a halt, that this would initially reduce the morale of minority workers, and that then this might generate hostility toward the company. He was worried that frustrated minority workers would lose interest in their work, or organize against the company, or would leave. In any event, he felt that productivity would be negatively affected, and that the company's market position and profitability might suffer, no matter how insignificantly. Furthermore, he was concerned that the company's societal commitment to equal treatment would be eroded.

He felt it important to make sure that the company's affirmative action efforts were understood to be internal and integral to the company and not politically motivated. To this end, he issued a statement to all employees stressing that the company's EEO commitment was an ongoing effort and was not dependant upon who was in the White House or what political party controlled the Congress. This example, while representative of only one company, is not isolated, and senior executives at other companies have expressed similar concerns and sentiments.

The role of equal employment issues within broader corporate objectives is, however, often still not well understood. While the attainment of progress in equal employment is viewed as an important objective by business, the manner by which the objective is attained causes wide divergence of opinion, depending upon the size of a company, its product line, its profitability, and whether it is in a growing or declining business. All of these elements influence a company's internal flexibility, which is the key ingredient toward effective EEO management by any organization. What we are talking about, after all, is jobs and moving people into those jobs.

My previous example of the company president's concern provides a key to understanding the role of equal employment opportunity in today's large corporate organization. There was never any question in his mind that equal employment was a part of his company's overall management program. His concern was not that equal employment was going to disappear at this company, but that it be understood by employees as an integral part of the company's human resource management process.

Our experience shows us that this is the general position in large companies today. Unlike the earlier history of EEO, companies have in major part made EEO a normal part of their management of human resources and have institutionalized many of its components. Every major U.S. employer with whom ORC is acquainted has an established EEO and affirmative action unit at its corporate offices, its divisions, and at any sizeable operating facility. This establishment of a company-wide management structure responsible for equal employment programs may have been at its formation dependant upon government regulation, but it has long since become a part of corporate management.

In addition to the specific functions assigned to designated EEO officials within a company, most large companies also have included EEO responsibility in the list of responsibilities assigned to all managers, and an increasing number of companies calculate a portion of a manager's annual salary package and rate of success within the company on the basis of that manager's demonstrated EEO successes. Further, EEO considerations have been built into a large number of other company areas, from compensation, recruiting, training and career development to areas such as advertisements and marketing. All of these programs are designed to assist the company to formulate, evaluate, implement, and monitor corporate EEO objectives in conjunction with other corporate objectives.

GOVERNMENT ROLE

One of the biggest impediments to the implementation of smooth and more effective corporate EEO programs in recent years has been the role of the Federal Government. The actions of the Government agencies during the past few years have often damaged on-going and successful company EEO programs by disrupting their operation or by damaging the credibility of company EEO officers. Government agencies responsible for EEO enforcement or contract compliance often appear, based on the demands that they put to companies, either totally unaware of how American business operates or locked in time in the 1960s, viewing every company effort in the EEO area with suspicion, and second-guessing every company decision.

The program most criticized by employers during recent years has been the contract compliance program under E.O. 11246. Much of what has been criticized about the role of government regulations generally is reflected time-and-again in the contract compliance program. Those companies who are among the 210 which comprise the ORC Equal Opportunity Group are mostly large federal contractors. They are, therefore, under the jurisdiction of OFCCP and subject to the requirements of that agency's rules and regulations. Consequently, the main theme of a large number of the discussions at Equal Opportunity Group meetings during the last few years has centered upon the demands of OFCCP officials and upon negative effects of various contract compliance requirements insisted upon by the agency. The criticism has been largely uniform, often severe, and always echoed by other companies with similar negative experiences.

It is not the purpose of this testimony to parade before this committee a long list of incidents pointing to the often destructive actions of OFCCP. However, the committee should be aware that there is significant mistrust of government intentions in the contract compliance area and that much will have to be done to improve understanding between the OFCCP and those companies which are covered federal contractors. While the EEOC has been subjected to may of the same criticisms in the past, its efforts during the past few years to improve its internal management procedures, strike a more balanced view in its processing of charges of discrimination, and increase professionalism among its staff have eased many of the earlier concerns that employers voiced.

The single greatest problem with OFCCP's implementation of federal contract compliance has been its rigidity and intransigence on what it views as compliance with the Exeuctive Order. This problem was most graphically demonstrated by the issuance in 1979 of the OFCCP Contract Compliance Manual. This guide to OFCCP field compliance officers subjects most aspects of any contractor's affirmative action compliance program to rigid requirements and allows little if any variation for individual business objectives and operating needs.

Some contractors have refused to accede to these kinds of rigid and inflexible demands, and have challenged the OFCCP's authority to insist on what are viewed by the contractor as unworkable or inappropriate procedures. The recent action in *Firestone Tire & Rubber Co.*, v. *Marshall*, 24 FEP Cases 1699 (E.D. Tex. 1981) is a case in point. There the company challenged the OFCCP's authority to insist on its method of determining when minorities are underutilized in certain job groups over that used by the company which, in fact, yielded identical, if no better results, The company prevailed; the court held that OFCCP had exceeded its authority in demanding that the company adhere to the rigid government formula. The Department of Labor recently determined to voluntarily withdraw its appeal of the adverse ruling of the lower court.

Affirmative action programs cannot operate rigidly and cannot be judged by an inflexible formula. OFCCP's tendency in the past few years had been to insist on unworkable job groups, artifical eight-factor availability analysis, unrealistice concepts of utilization of minorities and women, and rigid and inflexible goals and timetables. This approach has contributed to isolating affirmative action functions in many companies. Their overall effectiveness has been because affirmative action has come to be viewed as a responses to government demands an not as an intergral part of management.

To make corporate equal employment efforts work notwithstanding these actions, many companies have for some time maintained what amounts to a "double set of books." These companies maintain one affirmative action plan for submission to the government for review, while a different and often much more demanding program is used for their internal EEO objectives. These paralled internal programs are specifically designed to reflect the company's management philosophy and incorporate its unique features and needs. These companies have found that the only way to maintain any momentum and creditability to their affirmative action programs was to divorce them for the government's contract compliance requirements.

We are aware, of course, of the recently issued proposed changes to OFCCP rules and regulations from the Department of Labor. While this is not the appropriate place to discuss each of the numerous changes proposed in the agency's rules, we generally support the revisions that the Department has published. While we do not fully agree with some of the proposals such as the new threshold provisions for written affirmative action plans which would exempt small businesses while forcing large employers to absorb the brunt of contract compliance, we applaud the easing of many of the rigid and unnecessary paperwork requirements that have characterized the contract compliance program to date. We are developing detailed comments to the Department based on the reactions of the companies in the ORC Equal

Opportunity Group and would be pleased to submit a copy to the committee when we have completed our analysis.

We hope that the Department of Labor will move quickly to implement the more balanced rules and regulations reflected in its current rule-making proposal. Further, we also hope that the Department will quickly revise certain other critical areas of its rules and regulations, as it has already indicated it will. The three most important areas, availability determination, back pay, and job group formulation, are major elements of attaining a balanced contract compliance program which, when combined with the present proposals to ease the paperwork burden and allow greater individual company flexibility in affirmative action plans will produce a much more meaningful and effective contract compliance program.

THE FUTURE OF EQUAL EMPLOYMENT OPPORTUNITY PROGRAMS

Throughout my testimony, I have attempted to emphasize to you, Mr. Chairman, and to the committee, that the role of corporate EEO programs is undergoing dramatic changes, and that company perspectives on equal employment opportunity are very different in 1981 than they were ten or even five years ago when many existing government regulatory and legal positions were formed. I am not always confident that the government understands these changes and appreciates the institutional nature of many corporate EEO policies and programs.

I am, however, also not naive enough to suggest that all companies have come to the present stage of their development willingly, and that all enforcement programs or regulatory initiatives should be abandoned. However, I feel that the government can better utilize its resources and achieve more effective EEO implementation if it understands some of the major shifts in equal employment concerns and programs.

Changes in the external work force.—With or without direct government pressure, employers will be hiring larger numbers of minorities and women to staff their work force. This will be necessary because minorities and women will increasingly account for a larger portion of the available labor pool in the United States. In a study done by Howard N. Fullerton, Jr., a demographic statistician in the Bureau of Labor Statistics, and published in the December 1980 Monthly Labor Review, a projection of the labor force to the year 1995 shows that women workers will account for two-thirds of the total growth in the labor force, and that the black labor force will grow twice as fast as the white force.

Further, in some major population and employment areas, the results of the 1980 census will show a dramatic increase in minority population. Preliminary results of the 1980 census for the top 50 metropolitan areas, published in the August 1981 Numbers News, a supplement to American Demographics, show that blacks will account for over 20 percent of the population in eleven of the 50 metropolitan areas (Atlanta, Baltimore, Birmingham, Chicago, Detroit, Memphis, Newark, New Orleans, New York, Norfolk, and Washington, D.C.). Although Hispanics will account for over 20 percent in only three metropolitan areas (Los Angeles, Miami, and San Antonio), the Hispanic population will be larger than the black population in ten metropolitan areas. It is also important to note that in two metropolitan areas (Miami and San Antonio) blacks and Hispanics will account for over 50 percent of the population. I have attached a copy of the projections for all 50 metropolitan areas to my testimony.

Changes in the internal work force.—The changed composition of the internal company work force is as significant as these external figures. While individual company figures showing utilization of minorities and women are not publicly available, aggregated EEO-1 statistics are published by the Joint Reporting Committee. A review of these figures shows that both minorities and women have made and continue to make significant progress in integration of the work force. Recently, a growth comparison between 1966 and 1978 participation rates, published in an April 9, 1981, General Accounting Report to the Congress entitled "Further Improvements Needed in EEOC Enforcement Activities," show a steady increase in all categories for women and minorities, except in unskilled laborers and service workers for minority males. The fact that there is a negative growth in these two categories for minority men should be an encouraging sign, because these are the lowest paid and most menial of jobs in any organization.

Since these figures reflect all companies with 100 or more employees, it belies the fact that the growth rates among minorities and women among large employers has generally been faster than the figures shown in the GAO report. ORC's experience with those companies in the Equal Opportunity Group, confirmed by our own internal surveys, bears out this fact.

Consequently, major U.S. companies have assured the continuity of EEO within their own organizations. An integrated work force which was recruited under the aegis of affirmative action will insist that those efforts continue once they enter the work force. Each employee entering the work force today is more sophisticated than those of a decade ago and are much more cognizant of their rights and much more vocal about their expectations. Employees, therefore, now account for the internal, upward pressure of EEO as they seek to improve their position and status within the organization, and push against any of the remaining barriers to affirmative action that may still exist within an organization. Consequently, companies will have to provide their minority and women workers appropriate incentives, advantages, and fair treatment or suffer crippling turnover as minorities and women go to companies where internal equity is more apparent.

Changes in emphasis.—This new internal pressure for equal employment has also changed the areas of concern. Prior to the late 1970's, EEO concerns were primarily focused on recruitment and selection. With the integration of the work force, management concerns have shifted to those employment systems which control an employee's future in an organization. The systems which are coming under increasing review are such areas as performance measurement, job evaluation, "comparable worth" and wage disparity, and job standards.

I have appended to may testimony a quick-reference chart of the major new issues which reflect EEO concerns and what some of those concerns are.

This set of new and evolving EEO concerns, spurred on by court rulings such as *Vuyanich* v. *Republic National Bank*, 24 FEP Cases 128 (N.D. Tex. 1980), where a great many of these post-selection issues came under extensive scrutiny, is paralleled by a general new set of employment concerns which younger workers bring to the work place. In recent attitude surveys of younger workers under 35, attitude research firm of Yankelovich, Skelly, and White, found that younger workers are bringing them expectations of certain entitlements which they assume employers will provide. These attitudes touch upon a large number of employment areas, but focus heavily on an expectation of equity, self-development, and individual recognition. Accordingly, as these personal concerns focus on minority and female issues company EEO programs will not be able to escape addressing these new concerns and these new concerns will not be able to escape EEO pressures.

The net result of these new attitudes and concerns will be to require a much more sophisticated and well-developed management response in all areas affecting employee relations. However, unlike in earlier EEO issues such as recruitment and selection where the factors of discrimination could be identified, isolated and measured under some type of uniformly applied principles, these new areas do not lend themselves to such categorical assumptions.

The existence of discrimination in such categorical personnel decisions as initial selection has often been inferred by the courts and agencies from simple statistical disparities between minorities and whites, men and women. Where a personnel action contains within it a uniform measure or value, such gross comparisons are sometimes meaningful. However, most of the new post-selection systems are interrelated, and reflect multiple and overlapping decisions and measures. Consequently, no uniform measure of the existence of bias is possible. As reflected by Judge Higginbotham in his ruling in the *Vuyanich* case, the individual effects of various complex personnel practices have to be examined both separately and in concert with other practices and measures. Existing government contract compliance standards or Title VII examinations have not yet made the distinction, and attempt to judge all corporate personnel practices by the same measures, often with untenable results.

THE ROLE OF MANAGEMENT

All of these elements in the changing nature of EEO concerns suggest that the role of government will have to change also. In order for companies to meet their EEO challenges for the next few years, they will have to design programs which are tailored specifically to their employment systems and needs and which are much more sensitive to the concerns of their employees. Accordingly, no uniform program can be expected to work in every instance or in every company even within an industry. Contract compliance cannot, therefore, assume to impose rigid and uniform requirements. Rather, each employer should be allowed to develop affirmative action programs which work within its business climate. The government should set broad guidelines within which such programs must operate, outline the kinds emphasis and results that it will seek, and monitor the results. In this regard, a broader perspective allowing for greater individual company initiative, such as reflected in parts of EEOC's Guidelines on Affirmative Action, will probably be more effective.

Management, for its part, will have to make EEO responsibility a company-wide activity. Informing individual managers of their specific EEO responsibilities will become more important to ensure that corporate employment decisions are consistent, reflect the EEO needs of the company, and constitute appropriate actions to implement corporate EEO objectives. Reflecting this concern, a recent decision by the Seventh Circuit Court of Appeals is quite instructive. In *Lehman* v. *Yellow Freight System,* Inc. 26 FEP Cases 75 (7th Cir. 1981), the company lost a challenge from a white male employee who had been passed over for a promotion which went instead to an apparently less-qualified black.

The substance of the ruling, however, is not an emphasis on the act of discrimination, but on the failure of management to inform the local manager of the terms of the affirmative action plan, the levels of minority participation that were expected at that particular facility, and the time frames within which these affirmative action goals were to be met. Without such specific instruction, the promotion of the black constituted unlawful preferential treatment in violation of the principles for numerical remedies set down by the Supreme Court in *United Steelworkers of America* v. *Weber.* Obviously, therefore, if companies plan to operate effectively within developed affirmative action programs, it will require a broad effort with trained and informed management.

Mr. Chairman, our testimony was designed to convey to you and to the committee a management view of affirmative action, and to present some perspectives on how those persons in private industry responsible for implementing the laws and regulations of equal employment opportunity view their job. We also hoped to present a perspective on how EEO is changing in the corporate environment. We hope that this information will supplement the committee's understanding of the various kinds of problems and concerns which make up equal employment as it enters the 1980s. We will be happy to provide the committee with any further information that we might have on any issue that we have raised, and I am grateful to the committee for this opportunity to appear and present the views of ORC in this important area.

ATTACHMENT I:

1980 Census Projections for 50 Largest Cities

The Numbers News / supplement to American Demographics

Blacks and Hispanics in the Top 50 Metropolitan Areas*

SMSA	Total Pop	Black	% Black	Hispanic	% Hisp.
1. New York	9,119,737	1,940,415	21.3	1,493,081	16.4
2. Los Angeles-Long Beach	7,477,657	944,009	12.6	2,065,727	27.6
3. Chicago	7,102,328	1,427,827	20.1	580,592	8.2
4. Philadelphia	4,716,818	884,405	18.8	116,280	2.5
5. Detroit	4,352,762	890,417	20.5	71,589	1.6
6. San Francisco-Oakland	3,252,721	391,214	12.0	351,915	10.8
7. Washington, D.C.	3,060,240	853,043	27.9	93,353	3.1
8. Dallas-Fort Worth	2,974,878	419,272	14.1	249,613	8.4
9. Houston	2,905,350	528,513	18.2	424,901	14.6
10. Boston	2,763,357	160,434	5.8	66,417	2.4
11. Nassau-Suffolk	2,605,813	162,484	6.2	101,975	3.9
12. St. Louis	2,355,276	407,734	17.3	22,284	0.9
13. Pittsburgh	2,263,894	175,603	7.8	11,881	0.5
14. Baltimore	2,174,023	556,872	25.6	21,410	1.0
15. Minneapolis-St. Paul	2,114,256	50,046	2.4	22,271-	1.1
16. Atlanta	2,029,618	498,821	24.6	23,383	1.2
17. Newark	1,965,304	417,513	21.2	132,356	6.7
18. Anaheim-Santa Anna-Gdn. Grove	1,931,570	25,205	1.3	286,331	14.8
19. Cleveland	1,898,720	345,632	18.2	25,920	1.4
20. San Diego	1,861,846	104,452	5.6	275,176	14.8
21. Miami	1,625,979	280,379	17.2	581,030	35.7
22. Denver-Boulder	1,619,921	77,779	4.8	173,362	10.7
23. Seattle-Everett	1,606,765	58,140	3.6	32,057	2.0
24. Tampa	1,569,492	145,701	9.3	79,429	5.1
25. Riverside-San Bernardino-Ont.	1,557,080	78,597	5.0	289,791	18.6
26. Phoenix	1,508,030	48,112	3.2	198,999	13.2
27. Cincinnati	1,401,403	173,656	12.4	7,877	0.6
28. Milwaukee	1,397,143	150,677	10.8	34,343	2.5
29. Kansas City	1,327,020	173,184	13.1	31,820	2.4
30. San Jose	1,295,071	43,715	3.4	226,611	17.5
31. Buffalo	1,242,573	113,975	9.2	16,206	1.3
32. Portland	1,242,187	33,384	2.7	24,327	2.0
33. New Orleans	1,186,725	387,393	32.6	48,407	4.1
34. Indianapolis	1,166,929	157,258	13.5	8,845	0.8
35. Columbus, Ohio	1,093,293	134,686	12.3	7,572	0.7
36. San Antonio	1,071,954	72,739	6.8	481,511	44.9
37. Ft. Lauderdale-Hollywood	1,014,043	113,582	11.2	40,252	4.0
38. Sacramento	1,014,002	61,298	6.0	101,692	10.0
39. Rochester	971,879	77,930	8.0	19,342	2.0
40. Salt Lake City-Ogden	936,255	8,684	0.9	47,268	5.0
41. Providence-Warwick-Pawtucket	919,216	24,928	2.7	19,333	2.1
42. Memphis	912,887	363,944	39.9	8,139	0.9
43. Louisville	906,240	117,845	13.0	5,472	0.6
44. Nashville-Davidson	850,505	137,348	16.1	5,973	0.7
45. Birmingham	847,360	239,673	28.3	5,531	0.7
46. Oklahoma City	834,088	74,960	9.0	18,522	2.2
47. Dayton	830,070	105,261	12.7	5,653	0.7
48. Greensboro-Winst. Salem-High Pt.	827,385	159,578	19.3	5,574	0.7
49. Norfolk-Va. Beach-Portsmouth	806,691	223,413	27.7	13,779	1.7
50. Albany-Schenectady-Troy	795,019	29,309	3.7	8,146	1.0

*Metropolitan Totals are final 1980 census figures. Black and Hispanic totals are provisional 1980 census figures.

ATTACHMENT II:

Post-selection Employment Issues

POST-EMPLOYMENT SYSTEMIC CONCERNS

General Concern: PROMOTION

Specific Systems	*EEO Management Issues*
• Job Descriptions	• Current job duties • Objective job values • Minimum, not ideal qualifications
• Performance Appraisal	• Reflects real job objectives • Job oriented not trait oriented • Objective evaluation criteria • Employee participation • EEO-sensitive review • Supervisory training

POST-EMPLOYMENT SYSTEMIC CONCERNS

General Concern: CAREER OPPORTUNITY

Specific Systems	*EEO Management Issues*
• Training/Education	• Reflects internal work force EEO distribution problems • Designed to correct disproportionate representation • Provides meaningful skills development
• Fast-tracking/Replacement Planning	• Uses meaningful job criteria • EEO sensitive • Reflects affirmative action needs

POST-EMPLOYMENT SYSTEMIC CONCERNS

General Concern: JOB VALUE

Specific Systems	*EEO Management Issues*
• Job Evaluation	• Subjective process not EEO sensitive • Preserves historical labor-market or company discrimination • Relies on suspect values • Not validated

POST-EMPLOYMENT SYSTEMIC CONCERNS

General Concern: COMPENSATION/BENEFITS

Specific Systems	*EEO Management Issues*
Wage Assignment	Based on biased market values Not audited for EEO impact
Benefits Programs	Women receiving less than equal benefits Sex-based disability — pregnancy Benefits programs disparately favor higher job levels

STATEMENT OF GEORGE P. SAPE, VICE PRESIDENT, ORGANIZATION RESOURCES COUNSELORS, INC.

Mr. SAPE. Thank you, Mr. Chairman, and I thank the committee for the opportunity to appear today to talk to you about some of our observations in the area of equal employment opportunity and affirmative action enforcement.

I should say at the outset since I suspect the committee members are not with us, we are a management consulting firm that specializes in areas of employment of personnel, industrial relations, labor relations, and the like.

Our base of activity is centered almost exclusively in the large companies in the United States, the Fortune 500, for a shorthand term. Much of what I would like to convey to you today is drawn upon from our experience with those companies in the area of equal employment opportunity and affirmative action.

I stressed at the outset we are a consulting firm. We are not a law firm so we do not attempt to analyze the legal in's and out's of each of these systems and whether one is better than another, although we do come into those problems.

We are not a trade association so I don't speak today for a group of employers or a specific industry group but rather perhaps reflect some of the work that is going on in some of the larger companies in the United States.

There may be some differences between what the large companies do and perhaps what the large number of small companies do in the United States. So, you will have to, I am sure, draw some conclusions about these large companies and the resources that they have to do some things that perhaps others are not doing right now.

The other thing, by way of introduction, perhaps more than anything else today I represent the views of many corporate equal employment opportunity managers. These are people who often are the least heard outside the narrow circle of their company. They have oftentimes few friends inside and fewer friends outside. They are the subject of the point of contact with the Government. They are also the subject of problems within their own management systems trying to accomplish the aims and objectives that they have been assigned to do. So if I take liberties to speak for anyone, I hope I can say that I reflect some of the views and concerns of corporate equal employment opportunity managers who have been assigned duties by their corporate management.

What I thought I could do for the committee today would be for me to present a management view of where equal employment opportunity is today in American business.

The reason I stress the management view is that oftentimes perhaps that is not heard very much because individual interest groups have individual interests. Individual companies have unique perspectives that perhaps reflect their work, whereas our contact with over 200 companies on a regular basis perhaps gives us a little bit broader sense.

The best way to appreciate the management perspective on equal employment issues, I think, is to look at American business leadership, and I find myself reluctantly agreeing with one of the previous speakers, I think it was Dr. Alexis, who said executives tend to be somewhat practical and somewhat callous even in how they approach problems. They are very practical. Their interest is to produce a good product, sell a good product, and to make a profit. Anything that falls too far away from that, that series of objectives, is viewed either with disinterest or with less than enthusiasm, and if it really interferes with that end, it is sometimes viewed with outright opposition. I think that sometimes falls—I think equal employment opportunity sometimes does tend to fall, in the minds of some senior executives, in one of those categories.

Notwithstanding that, the overriding interest in 1981 in most large corporations is to make a profit and produce a good product.

In 1981, executives for the most part are all operating with an integrated work force. By way of example that this practical sense takes a very nonpolitical direction, to give one example of a senior executive who is chairman of a large corporation who called me shortly after the new administration had been installed in office. Many of the press reports that I am sure you have all seen started coming out about the dismantling of equal employment opportunities, the holdback on affirmative action, and the various kinds of things that were presented.

He was concerned about these. I have no idea what political party he was affiliated with. I suspect he is for this administration. But he was very concerned about these reports. His concerns were based upon what those reports would do for the affirmative action program of his company. He indicated that he did have and recognized that they had integrated the work force over the last 15 years, there were large numbers of minority and women workers at various of the facilities that the company maintained, and that he felt that these reports seemed to suggest that in American business affirmative action and equal employment opportunity were motivated by politics, depending on who was in the White House. He felt looking at it again from a practical sense that that kind of feeling among the minority and female workers in that work force would result in their attitudes about the company changing, negativism perhaps creeping in, and there would be problems, and he was concerned about what the company could do.

Well, what the company ultimately did is what many companies are doing right now in our operation. That is to issue a direct statement to the employees that affirmative action and equal employment opportunity in this company was not motivated by politics and was in fact part of the established routine, established management style, and system of the company, and that employees should not look to the outside for affirmative action results, but to the inside.

That I think reflects part of where we see the management direction in the large employers with equal employment opportunity programs today.

Mr. WEISS. Mr. Sape, if I may, I have to ask you to be patient just a little bit longer. We have a vote on the floor at this point. We will vote and then come back. We will resume in about 10 minutes.

The committee will stand in recess.

[Recess.]

Mr. HAWKINS [presiding]. The subcommittee will reconvene.

Mr. Sape, you may continue.

Mr. Weiss will be back shortly, but in order to not unduly delay the witnesses, I think we should proceed.

So, will you kindly continue where you left off.

Mr. SAPE. Thank you, Mr. Chairman.

The point I was trying to convey to the committee was by using the example of the Chief Executive's concern and what has become the institutionalization of equal employment opportunity.

From my own personal experience, 10 years ago, it was viewed as a very external, perhaps inimical function.

I do not sense in our working with corporate organizations that it has become institutionalized, that in some respects it has become and is becoming increasingly mainstream in the organizations. As a consequence there have been increasing problems between corporations formulating better ideas that are unique to them, creating a conflict with the contract compliance program.

We have seen over the last few years increasing difficulty. The role of the Government is one that remains somewhat of an enigma and somewhat of a puzzlement to many corporate organizations. They feel that they have in fact come to terms with many of the concerns that are equal employment concerns. They feel they have made the kinds of adjustments and the kinds of changes that in fact achieve equal employment opportunity for them, yet they are confronted, particularly in the contract compliance program, oftentimes with very rigid, very inflexible demands, demands that do not take into account the individual corporate structure, the individual corporate ability to make adjustments and implement personnel programs and simply judge them against totally unrelated standards or standards that may be drawn from another industry or another part of the community.

We feel through our own work with these organizations, that there is still and will continue to be for some time a great deal of mistrust, particularly of the OFFCP and the contract compliance program.

I should say—maybe just because it makes me feel a little better because I was there for some time—that much of the concern about EEOC has disappeared over the past few years. I think, particularly in the last 4 years, the agency has improved its internal management process, improved the case processing system, charge revolution system, and many of the kinds of things that we used to confront EEOC we no longer hear. We continue to hear them about OFCCP and we do feel that there should be some work done to improve that agency also.

We are, of course, very much aware of the recently issued proposals and regulations that the Department of Labor has presented to try to, at least on the surface, ease some of the operating requirements that the OFCCP has placed on many large organizations.

By and large we support those proposals. We do think that the Department should move quickly to implement changes. We think the Department should establish a more balanced set of rules and regulations that will reflect the realities of today's equal opportunity climate rather than our race to perform some function of presupposition of what equal employment opportunity might have been in the private employer sector some years ago.

My greatest interest in appearing before the committee was to convey what equal employment opportunity looks like to us in the next few years, notwithstanding whoever the administration may be. In our view, in the large corporate institutions and organizations, we have an institutionalized concept of equal employment both as to the event and to actual management practices and systems. We feel that those kinds of progress that is what has been made will continue to be made, irrespective of who and what the external pressures from Government may be.

That is not to suggest that there are not serious concerns about Government positions. That is to suggest from the practical standpoint, again, the hardest part is over, the first 15 years of the Civil Rights Act. Clearly those were difficult times for corporate organizations to adjust to the new requirements.

They have, at least in our view, adjusted, by and large, to the changes and are looking forward to the next generation of equal employment that they face.

There are really about three things that are critical to us in looking at the future of equal employment opportunity and the corporate organization.

The first one represents changes in the external work force. Here, I think, more than anything else we see that even those organizations who may not be fully committed or who may be holding back on their commitment to hire minorities and women would have no choice in the next few years but to make that commitment.

The largest reason for that is that increasingly the labor pool that is available is minority and female. I would really refer the committee to a study done by Mr. Howard Fullerton, who was a demographic statistician who did a labor statistic where he made a very accurate projection—or at least it is the kind of projection that many people feel comfortable with—which shows that women workers will account for two-thirds of the total growth in the labor force up to 1995, and that the black labor force will grow during the same time period twice as fast as the white work force.

That to us indicates that organizations, whether they want to or not, are going to be confronted with a very different makeup of workers and labor force growth than they have seen in the past.

Furthermore, I think the 1980 census showed us some very interesting things also that I would refer to, and that is that in the 50 largest metropolitan areas in the United States which account, I would suspect, for the largest employment centers in the United States, the percentage of minorities and percentage of Hispanics and blacks accounted for a significant increase.

I have attached to my testimony a chart which shows the projection of the 1980 census in the 50 largest areas.

It is interesting to note just a couple of things. For example, two of those areas, when you count both blacks and Hispanics together, account for over 50-percent minority. That is a significant fact for any employer to know who has been in business in those areas because that is where they have to draw their labor force from.

There are 11 other metropolitan areas where the black population, for example, would be over 20 percent here in the next decade. So I think we are looking at an external labor force which is going to be changing and which will force businesses to adjust their own patterns.

It also would suggest that one of the key measures that future equal employment opportunity compliance, as it were, might use is to look at this external market and to begin to compare what an organization has done in the aggregate with its internal work force and whether that reflects the external durability.

We are dealing with quite a few of the companies that have undertaken a project to be done, using census material and applying it, so for the next 10 years we will have a much more accurate count of the available skills in the outside labor market and what those skills may mean for hiring inside. We would, of course, be very happy in the future when that project is developed to deliver the results to the committee for help in its work.

The second character, which I think is critical to equal employment opportunity, is the change in the internal work force. It is now 15 years later from the beginning of the period of equal employment opportunity, the formal beginning. Many new organizations that we deal with have significantly integrated their work force. The role of minorities and women has changed dramatically, the numbers have changed dramatically.

Of course it is not publicly available to discuss equal employment opportunity statistics for individual companies because of the sensitivity of that information that companies still have, but aggregated statistics are available, and I would simply refer to the statistics published by the GAO in its April 9 report to the Congress on EEOC, which shows that there were considerable changes in the total percent utilization of minorities and women in all major categories.

We, therefore, feel that this change in the internal work force of major organizations has also produced and is now beginning to produce at an accelerated rate internal management changes, changes in emphasis in equal employment opportunity.

Much of the early history of equal employment opportunity is centered around selection and recruitment material, and while we do not suggest that is no longer important, I do feel—it is purely based on observation of programs that are being worked on right now—that that emphasis is changing. The recruitment-and-selection process has, by and large, established itself. Much of it has been litigated, corporations have adjusted so that, by and large, it at least assures them of a continual flow of minorities and women into the work force to satisfy their various needs.

What, of course, has happened during that same time period is that people who have gone to work for those organizations in the last 15 years have represented a very different mix of work force—of employees than those who were there before. Not only has it resulted in an increase of minority and women workers, but it has resulted also in a very different attitude of employee. Employees are much more vocal now about their aspirations, their needs, and their interests. They are much more willing to go to the outside if they feel a corporation does not satisfy their needs. They are much more willing to leave.

There was a study done recently by the attitude survey team of Yankelovich, Skelly & White which of course as you probably know, there is a general sampling of attitudes which really bears this out and which clearly indicates that when it comes to matters of equal employment opportunity, employers will be faced with an increasingly vocal and assertive work force that brought into equal employment opportunity and affirmative action programs in the recruitment and selection stage would insist that those same principles be continued and be part of the ongoing management responsibility to the organization.

As a consequence, we now see corporations more and more turning inward to examine their own programs or management system. Just a few years ago, it was really not a common practice for corporations to conduct personnel audits. They would audit themselves on the operation of their various personnel assistants. Now it is uncommon for large organizations not to conduct routine audits of their personnel operations to reevaluate their own status in the treatment of employees generally.

We are looking at new systems. I have attached to the testimony a quick-reference chart, a series of tables which show the major employment systems that we find corporations are increasingly studying to determine whether or not these are working to provide the kinds of things the organization wants for minorities and female workers as well as the population in general.

What we see coming out of much of this is a concept of work force or workplace equity wherein fairness in the workplace becomes paramount to some of the more traditional ways, perhaps, that the employment system was administered in the past.

The role of management in all of this is critical. It is necessary for an organization to recognize from the top down that equal employment opportunity, now that it is an integral part of the corporation, to work effectively, it needs senior management commitment. Sometimes that is possible and sometimes that is very difficult. That remains to be one of the biggest challenges to the equal employment opportunity manager, that person I mentioned at the beginning of my testimony with whom I deal more closely than I do with other parts of the corporate organization. That is the person who has to persuade senior management that equal employment opportunity is good business. Increasingly equal employment opportunity managers are doing that. They will have to do that over the next few years.

In order to make equal employment opportunity work in the eighties, I do not think that more Government pressure or more Government activity will help.

Large organizations have found that the Government oftentimes poses a threat. Compliance agencies have spent a lot of time moving paper from one office to another office with very little to show by way of enforcement. EEOC has stepped up its individual charge process system, resolving charges at an accelerated rate, has not generated any large recent action that would convince corporations that the motivation for equal employment opportunity should be the external threat.

The motivation for equal employment opportunity is the internal concern for the human resources that it has. Human resources like other resources are an investment. It is expensive to get employees, it is expensive to train employees, and it is expensive to keep employees. The corporations increasingly are working toward retaining and maintaining a stable work environment which when we talk about a work environment means maintaining good equal employment opportunity programs internally.

I hope that some of this information is helpful. We will, of course, be happy to submit any further answer to questions as they emerge. We do have data and information which we will be happy to provide.

Mr. HAWKINS. Thank you, Mr. Sape.

Certainly there is not the desire of this committee, nor it seems to me, the intent of the Equal Employment Opportunity Act, to interfere with corporate decisions. Admittedly, any type of compliance program would involve some paperwork, but can you be a little more specific as to what regulations appear to be imbalanced and which part of the enforcement process imposes unreasonable paperwork on the corporate sector?

Mr. SAPE. Again, speaking just on the basis of our experiences, perhaps the biggest annoyance, the biggest drain on corporate activity in trying to maintain equal employment opportunity programs has been the revised order No. 4 program under Executive Order 11246. As part of that program, contractors are required to maintain individual written affirmative action plans at every facility where they have Federal contracts. For a company that has 500 facilities, and that is not uncommon when you look at organizations such as the insurance business, at some of these facilities there are five people, and they are required by the legislation to maintain a full affirmative action plan at each facility. They get audited, and if they do not have a full compliance program at each facility, they can be cited for deficiency, and, of course, sanctions would be invoked.

That does not serve, in our view, the future of equal employment. It creates simply a paperwork burden. These people do not really implement equal employment opportunity programs, they simply maintain the paper that accounts for the existence of the affirmative action compliance plan. That is one example that we would cite.

Mr. HAWKINS. I was a little confused as to why an employer of only five employees would be required to have an affirmative action written plan at that location. It seems to me that illustration does not conform with the present exemption.

Mr. SAPE. The current process under the Executive order gives the corporate parent the contract, and all entities of that parent become a part of that contract. So if the contractor himself has over 250 employees, all parts of that organization are covered. The way that has been interpreted is to require a written plan at each location.

Mr. HAWKINS. For that location alone, is that it? That seems to be a total corruption of the idea. I would certainly agree with you, that would be unreasonable.

Do you have any other examples?

Mr. **Sape**. Another example which is somewhat different, and this one gets closer to the question of enforcement compliance, it does generate a paperwork process, and that is something that is referred to as the age factor availability analysis. You may have had other witnesses testify on that.

Essentially the purpose of this analysis is a good one, and that is to establish a measure by which to identify whether or not an organization is utilizing minorities and females at levels that it should be given their availability in the work force. The problem is that with almost everyone who has studied this process, I am talking about demographers, economists, agree that it is not a feasible process. It tends to double count and overlap factors. Some corporations cannot comply with that, yet through repeated compliance reviews, OFCCP insists not only on the rigid adherence to the age factor analysis, but specific weighting for each factor whether or not that makes sense to the organization or not.

What one finds, therefore, is that corporations go through extensive paperwork burdens to justify the age-factor analysis when it really does not even reflect a reality of what we do in the process. This we have found results almost in a double set of books. Managers are not going to manage by something that is unrealistic; they will manage by what makes sense. They will prepare the age-factor analysis for the Government and leave it on the shelf, and when the Government agent comes in, they will give him the age-factor analysis and not spend days arguing on who is right and who is wrong on each one of the factors.

The organization itself is maintaining a set of internal objectives oftentimes more stringent than those found in the affirmative action plan of the Government. We are really doubling the process simply by the rigidity of the system. This concept was developed really for the defense industry and would make some sense given the production requirements involved in that industry.

Mr. **Hawkins**. Feeling such analysis is not necessary, are there feasible or effective alternatives?

Mr. **Sape**. There are. It would require, of course, a major change for the Department of Labor. We feel all that is really necessary by way of judging generally whether compliance is or is not taking place is perhaps what I would call a 2- or 2½-factor analysis. The key indicators really are what is the availability outside? What does the employer have at clearly specified job groups and job levels? And then what is the employer doing by way of gaining an upward movement to modify those levels?

That is really all you need to look at. It is a very simple process. There is no mystery in moving people from one job level to another job level or hiring people from the outside to do a certain job. To go through the elaborate cross-referencing that the OFCCP has set up quite frankly is burdensome and counterproductive.

Mr. **Hawkins**. Do you consider the setting of goals and timetables to be an unnecessary burden?

Mr. **Sape**. Goals and timetables are a form of measurement as long as the failure to make a goal—we often call them corporate objectives; goals and timetables has an unfortunate connotation. The failure to meet an objective should not be a presumption that discrimination is taking place. It should be the beginning of an inquiry to see whether or not things changed during the course of the year that a goal or objective could not be met. But the use of a measurement system, as some of the witnesses testified to earlier today, there is nothing unusual about that. I would find it surprising if a large number of corporate organizations would oppose the existence of some kind of numerical measurement.

Mr. HAWKINS. I assume from the answer that you do not necessarily look upon them as quotas.

Mr. SAPE. No; we look upon them as management tools.

Mr. HAWKINS. Mr. Weiss?

Mr. WEISS. What do you think will be the effect of the individual approach rather than the systemic approach on the companies which are not already involved in affirmative action programs?

Mr. SAPE. Well, in the first instance I guess my problem is, I heard by reference that the Attorney General testified this was going to be the Justice Department's approach.

I have some difficulty with that, only because I suppose in our business we take our cues more from the Supreme Court than we do from the Justice Department. The Supreme Court in 1971 told us that systemic discrimination was one of the two kinds of discrimination we need to look at. I have not heard the Supreme Court say that has changed.

When the Attorney General is appointed to the Supreme Court, I may be more attentive to that issue.

I think we will have systemic discrimination in organizations where there are problems, large-scale discrimination. I think just by the sheer place where American business is today, we are not going to see that much more systemic discrimination.

Most of the major problems would give rise to the concept of systemic discrimination such as in 1971, which entailed the wholesale exclusion of minorities and women in certain jobs and certain industries. That is no longer there. So I do not see the concept—I see it of diminishing importance. I do not see it disappearing. It certainly is not disappearing because one part of the Government says it is no longer around.

Mr. WEISS. This administration when it came in, told the Commissioner to discontinue trying to substantiate charges of systemic discrimination. Sears, Roebuck comes to mind. The Commission had been at that for a number of years. They were in the process of getting a settlement from Sears, Roebuck when all of a sudden the administration says: "Hands off, we are not going to be concerned about this any more."

I am not sure (*a*) that in fact we do not have these kinds of problems anymore, or (*b*) that in fact this will not have an impact in the Government charging individual acts of discrimination rather than systemic.

Mr. SAPE. I guess I am reminded of the fact that prior to 1972 and the passage of H.R. 1746, EEOC could not sue anyone anyway. Most of the systemic cases that were developed prior to 1971, the big ones.

Where there are grievances, where there is discrimination, I think potential employees or current employees would take it to court. If the courts roll back the concept of the seventies, then it is no longer available. But at the present time I think it is still available as a form of remedy. Whether it should be used by the Government or not be used by the Government, quite frankly, I am not in a position to say.

Mr. **Weiss**. Well, given the example that you cited at the outset of your testimony about the phone call you received from the head of this large corporation, and the concern that he expressed to you, I do not quite understand why you would not be in a position to say what the Government ought to or ought not be doing, if you are concerned about the kind of signal that employees of the corporation which you represent may be getting, which may not be the signals that the management of those corporations would want them to get.

Mr. **Sape**. Well, on that point, I think the kind of signal that the Government sends out is very important, and I think perhaps if the Justice Department is sending a signal that it is going to be more lenient in the area of equal employment opportunity, that is going to be the kind of signal that some corporate managers are going to find troublesome.

The mere fact that the Justice Department if it is in fact going to no longer pursue systemic cases and if that in fact does impact on the EEOC, which I really do not know today whether it does or does not, that will change a very small portion of the total enforcement process of equal employment opportunity. I think most corporate managers perceive that.

The corporate concern and the corporate disillusionment with EEOC has been less with EEOC and title VII than it has been in the whole concept of the program. The signals from EEOC at this time, because of the number of vacancies on that agency, are not forthcoming.

I really do not know what the position of the Justice Department is, whether it will represent something that will trouble the chief executive officer or simply reinforce his concern. He is the kind of a person, however, who would say, "I don't really care now any longer what the Government is doing, because we have come to grips with it."

Mr. **Weiss**. That is as far as the company which has conquered the problem, and even there you have indicated in your testimony that there may be an internal problem that is created by the Government reversing field in this situation. But some of the testimony we heard before you indicated that in fact it is a fairly expensive proposition to adopt an affirmative action program and that in fact a number of companies may in fact decide if the Government does not care to enforce systemic discrimination violations any more, why should they?

You are suggesting that in fact there is hardly any of that anymore.

Mr. **Sape**. Based on the context which I can speak from, which are 210 companies we deal with on a regular basis in the area of equal employment opportunity, we are familiar with their programs, know what they do and how they do it, and we know their progress and their failures. None of those companies do not have not only an affirmative action plan but an extensive affirmative action program. So in my experience, I am sure there are companies out there which do not. I am positive of that. I do not know who they are or where they are right now, but among that part of the corporate environment which really represents the top of the Fortune rating of large corporations, I do not think you are going to find a corporation that does not have an affirmative action plan that is probably far in excess of anything the Government even thinks they have.

Mr. WEISS. I guess to close out, are you saying as far as you are concerned, it does not make any difference whether in fact the Justice Department moves on enforcement from systemic acts of discrimination to individual acts of discrimination, or as far as you are concerned you do not want to comment on that because it is none of your business?

Mr. SAPE. I could say I do not want to comment on it. I think I can answer the question because the Justice Department does not have the authority to sue under title VII any of the companies that I work with. The Justice Department only has authority to sue public institutions. So frankly from our standpoint, and I am sure from the standpoint of the companies we work with, the Justice Department issuing a statement they will no longer pursue systemic cases would be interesting to the city of St. Louis and the city of Denver, but not to any of the private employers who are currently under title VII jurisdiction.

Mr. WEISS. There is a piece of legislation, apparently it has been rejected, but was proposed by some of the more liberal members of the opposite party which in essence would remove enforcement powers from the Commission and transfer all of it to the Justice Department.

It was in that context that it seems to me there is some cause for concern as to Government's view on the matter.

Mr. SAPE. There is a long-term concern. Were this to happen tomorrow, I would suggest that would constitute a disruptive event in corporate equal employment opportunity programs. If it happens 10 years from now, I would suggest it would make very little difference because systemic enforcement will have ceased to be the major event that it already has.

There is a court case that I would simply for the record indicate that is taking the first step toward this already. That is the decision against the Republic National Bank of Dallas, which I have cited in my testimony, where Judge Higginbotham, after extensive trial which looked into allegations of systemic discrimination throughout this particular bank, concluded that the whole concept of systemic discrimination was an archaic concept. It was designed for an earlier time when you could not establish except by a page of proof the practices that lead to discrimination.

As we move into a more sophisticated time, the employment system as a rule has new areas where discrimination may be present. We have also added other things like computer-applied statistics to demonstrate how certain employment practices impact to the point where we can refine the individual impact and infer the existence or nonexistence of discrimination. If Judge Higginbotham is in fact correct, then the failure to pursue systemic discrimination cases may be a small item indeed. I do not know that.

Mr. **Weiss**. I have not read that decision, so you have the advantage over me.

Thank you very much.

Thank you, Mr. Chairman.

Mr. **Hawkins**. Thank you, Mr. Weiss.

Thank you, Mr. Sape. Your testimony is very valuable to the committee. We appreciate your appearance before the committee.

Mr. **Hawkins**. Our next and final witness is Mr. Lawrence Lorber, Esq., representing the American Society for Personnel Administration.

Mr. Lorber, we welcome you before the committee. We look forward to your testimony. Your written statement in its entirety will be entered in the record at this point, and perhaps we might better gain from your giving us the highlights of it, rather than with reading the prepared statement.

You may deal with it as you so desire.

[The prepared statement of Lawrence Lorber follows:]

Prepared Statement of Lawrence Z. Lorber on Behalf of the American Society for Personnel Administration

Mr. Chairman, members of the Subcommittee, my name is Lawrence Lorber. I am appearing before you today on behalf of the American Society for Personnel Administration.

The American Society for Personnel Administration (ASPA) is the world's largest association of personnel and industrial relations professionals representing nearly 34,000 practitioners in business, government, and education dedicated to the furtherance of personnel and industrial relations management. ASPA members are involved in all aspects of personnel policy including the development and implementation of employers' equal employment and affirmative action policies. The organization has long been involved with the contract compliance program including the sponsorship of numerous continuing education seminars on various aspects of contract compliance as well as taking a leading role in establishing the climate which has enabled the broad consensus in favor of equal employment to become a fact in American life. Indeed, while ASPA members come from every level of business and government, and hold positions at every level within their organizations, ASPA represents the operating personnel practitioner of the small to medium size compnay or operating facility within a larger company. This background and membership composition gives ASPA a rather unique perspective on the contract compliance program and the real functioning and possibilities of affirmative action.

My own background might be of some assistance as well. I am currently a partner in the Washington office of Breed, Abbott & Morgan and represent employers in all aspects of equal employment including OFCCP matters. Prior to my joining the law firm, I held various positions in government including that of Director of the Office of Federal Contract Compliance Programs in the Ford administration. During that tenure, the regulatory reform effort at the OFCCP was commenced, including various detailed discussions with subcommittee staff and testimony before this subcommittee on that vital question. As a result, I hope I bring some perspective and understanding of the issues to you.

As I noted, the effort to reform the regulatory procedures of the OFCCP, and a general consensus that such reform is necessary is not new. It is safe to say that few of the government's regulatory programs have been the subject of such a sustained review process. Why that process has taken so long, with so little tangible result, is, I believe, one of the vexing problems your committee must address. I believe one of the main reasons is the woeful lack of understanding of the nature of the OFCCP program and its role in the broad spectrum of the government's equal employment efforts. As this Committee is well aware, the public policy towards equal employment has been marked by a conscious desire to broaden the avenues relief and multiply the forums in which equal employment issues can be raised. While each program, or statutory scheme has certain distinct features, remedies, and obligations, the overall concept has been to afford as many different means of relief as possible. Were one to try to create an apple big enough to absorb as many bites as are possible in this area, one would have to create an apple bigger by far than has yet to be discovered.

Of interest is that this development has not come without debate. Indeed, the Congress was not unaware of this problem when it enacted the Civil Rights Act of 1964 and when it fundamentally amended Title VII in 1972 giving the EEOC enforcement authority. In the debates of 1964, the Senate defeated an amendment offered by Senator Tower which would have made Title VII the exclusive federal forum for dealing with allegations of employment discrimination, and the House rejected an amendment offered by Representative McClory which would have prevented an overlap between Federal and State jurisdiction. In 1972 the Congress rejected an effort to merge the OFCC into the EEOC. And in 1978, President Carter rejected a recommendation that the OFCCP be folded into the EEOC. These results, based as they were upon the assumption that more rather than less was an appropriate public policy in the employment discrimination area created a bureaucratic problem which has yet to be resolved. That is, what is the appropriate role for the agencies. Too, and most important for these hearings, could an accommodation be made between the agencies so they could supplement each other and contribute to the national goal of equal opportunity, or would they merely mirror each other and compete for the same prize. In this regard, the dichotomy between affirmative action and non-discrimination becomes paramount.

This analysis of the issue, which I believe would successfully stand close scrutiny, provides a backdrop for the conflict today between the proponents of rational reform of the convoluted regulatory mess that is the OFCCP and those who decry any change as an attack on affirmative action. First, it must be pointed out, and in ASPA's opinion, highlighted, that the modest changes proposed by the administration to date neither effect in any way meaningful the substance of what is now known as affirmative action or indeed, fundamentally alter the burdensome aspects of the program. In our view, the package of changes so far proposed are, in essence, merely bureaucratic responses to a deeper problem. A regulatory scheme which has resulted in mounds of paperwork and data, unread or reviewed by the government and practically irrelevant to the reality of personnel administration will not be changed. Fewer employers will have to engage in the expense and effort, and perhaps some will not have to do it as frequently, but for those employers, who, as the Labor Department itself notes will still employ over 70 percent of the covered employees, there will be no change. On an accounting basis, paperwork reduction will be shown, on a real basis, there will be no change.

This is not to say that there will not be improvement. Reduction of the covered universe could result in a better use of resources and more rational reviews. But the substance of the burden, the highly controversial methodology of determining the measures which trigger the affirmative action obligation, the rigid requirements that all employers group their employees according to the same formulas, regardless of the skills employed, or the business structure and other fundamental questions are still reserved for further review. Yet it is these issues in the first instance which create the problem. So that the regulatory changes proposed attempt to deal with a problem by lessening the infected area, but not by eradicating the source of the infection. It might seem to be the better course to deal with the fundamental questions first; and only then review the universe covered to determine if relief is needed.

ASPA would suggest that the means are at hand to readily make these changes. The previous two administrations had recognized that the methodology for determining availability needed to change. Indeed, the Carter administration commissioned an elaborate and expensive study to determine if the factors used to determine availability should be changed. That study recommended sweeping changes, which reflected a rational and workable definition of affirmative action and attempted to define, for perhaps the first time, what the obligation actually meant. Simply put, the question always present but never answered was whether the obligation meant that special outreach, recruitment and even employment considerations would be directed to those in our society who are currently employable or at a stage where they can be readily trained, or whether the obligation for employment would go beyond, to any member of society who simply belongs to a group deemed deserving of special consideration. This conflict has always bedeviled the program, and has been the cause of much of the concern and burden. In practical terms, the program as is currently constituted, requires employers, large or small, with vastly differing resources and structures to quantify in minute detail the availability for employment in specific jobs without regard to specific skill needs. Whether or not the total population actually possesses necessary skills is irrelevant. The assumption is that everyone is employable for every job. The wish becomes the reality. This has caused much of the conflict, much of the confusion, and much of adversarial nature of the program. Our personnel specialists are compelled to engage in esoteric, and often unreal debates with OFCCP personnel untutored in labor maket economics as to what availability is. Costly data collection efforts, repeated two or three times for one review are required, and every employer, whatever its size, must go through this meaningless exercise. We would therefore recommend an analysis of the Abt report, and its rapid adoption.

Too, we would question the capacity of the government to require every employer to structure its workforce along rigid lines. The workplace is too diverse, and the government's expertise too limited, to require with any degree of rationality this homogenization of the American workplace. Rather than require one job group methodology or even offer one or two options, the OFCCP should allow each employer to decide its own best means of structuring its workforce with the understanding that the employer may have to explain its structure if questions arise. Should this concept be adopted, much of the paperwork burden, much of the excessive cost and much of the criticism of the program would disappear.

Other substantive aspects certainly need review. Of particular importance in ASPA's view, is the need to review OFCCP's role in the equal employment spectrum. As I noted at the beginnning of this testimony, there is no gaping void in the mosaic of EEO laws or regulations which the OFCCP fills. Absent any OFCCP or Executive Order, not one individual who is now afforded protection and assistance in his or her quest to become a part of the American workforce will be left unprotected. The assumption that qualified persons will be left unprotected without the OFCCP as currently constituted and enforced is simply without foundation. Indeed, most of the significant cases in equal employment law came as a result not of government involvement, OFCCP, EEOC or Justice Department, but rather as a result of private litigation. So that we must view the OFCCP as a supplement to the equal employment effort and fashion a role for it that will contribute to effort and not dilute it. To that extent, it is ASPA's view that careful review must be made of the almost single focus of the OFCCP on copying the EEOC and private litigation. Indeed, the OFCCP has been most ingenious in expanding its adversarial role, creating new, unlimited doctrine to give itself the authority to expand its reach so that we have experienced extended litigation over the dubious and unsupportable proposition that there were no limits on OFCCP's authority. The D.C. Circuit Court has decisively, and hopefully finally rejected this contention. We witnessed significant expenditures of time and resources over the question of the OFCCP's ability to demand the production of data, computer tapes, indeed even confidential university tenure discussions so that it could satisfy its apparently unlimited appetitie for numbers and paper with no indication at all that the agency could utilize the information at all. Not one job was created, not one individual's wrong righted nor was any conceivably useful result obtained by these cases. Rather, the only issue raised was whether the OFCCP could retire the title of most uncontrolled bureaucratic bully in town.

ASPA would strongly suggest that OFCCP refocus its main efforts to the business it was created to do, that is, expand the job opportunities for minorities and women on government contract related work.

Finally, we must note that the confusion over the OFCCP, its proper role and structure, in no small part results from the confusion over the term affirmative action itself. Almost unequally in public policy, a whole body of law, and perhaps our most vexing social debate has grown around a term which is both undefined in any specific sense and used interchangeably in many contexts. The obligation for a government contractor to take affirmative action is an independent obligation found in Executive Order 11246. The Order also requires the contractor not to discriminate. The terms, at least in the OFCCP context are not synonymous. Unlike Title VII, the Executive order is silent on what remedies are appropriate after it has been determined that the Order was violated. Thus, nowhere does the Order define what is meant by affirmative action. As the program evolved, one method of determining whether affirmative action efforts might be required was the use of numerical standards. Goals and timetables did not become the definition of affirmative action. Rather, they were introduced in 1969 and 1970, long after the Executive Order was promulgated as a means of measurement. That they have evolved in only ten years to assume almost a mystical role in our society should be a source of great amazement. That they have been interpreted to become the sole definition of affirmative action should be a cause of great concern. Indeed, I believe and ASPA's own members would attest to the general proposition that numerical standards can be a helpful tool for employers to measure and prioritize their own efforts. But to create of this helpful tool a rigid unyielding system whereby ability, merit and even equity are abandoned, where jobs are to be doled out by the government as an allotment, and where every employer told how its workforce must appear on a demographic matrix of racial and sexual characteristics is simply unwarranted. And by so doing, this helpful tool will become so offensive to our constitutional standards that it will ultimately be rejected.

It is ASPA's hope, therefore, that this committee will engage in a dispassionate, and non-partisan review of this crucial issue. Rigid adherence to a bureaucratic system jerry built over the last decade will not be constructive. Condemning all those who are attempting to create a more rational and less intrusive system which will truly meet its mandate as enemies of affirmative action will not be productive. Rather, it will confirm the view which is gaining ever wider acceptance that affirmative action is antithetical to our basic concept of fairness and merit and that it has no place in our system. ASPA believes that such a result will constitute a disservice to the cause of equal opportunity in employment to which its members devote almost the entirety of their professional lives.

STATEMENT OF LAWRENCE Z. LORBER, ESQ., AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION, WASHINGTON, D.C.

Mr. LORBER. Thank you, Mr. Chairman.

It may be helpful if I very briefly describe the American Society for Personnel Administration, the organization I represent.

It is the world's largest organization of personnel and industrial relations professionals and represents nearly 34,000 practitioners in business, government, and education. Its members are predominantly those who are the operating personnel practitioners in companies. They are the people who administer and create affirmative action plans and are responsible on a day-to-day basis for the operation of personnel systems and the implementation of equal employment opportunity policy type preparations. Indeed I would suppose the members here are not even one step away from those who Mr. Sape spoke about as equal employment opportunity managers.

It might be helpful for the committee to give a very brief summary of my own background. In the Ford administration, I was the Director of the Federal Office of Contract Compliance Programs. At that time I had the opportunity to testify before your committee and meet with your staff and I think, at that time, made the initial effort to form the OFCCP regulatory process. At that time we did not think it would take that long. It is now 6 years later and the issue is still with us.

The testimony that I presented and will discuss today will focus in large measure on the OFCCP.

I think it is important in the context of what the administration has been trying to enact at OFCCP to bring the affirmative action issue into some perspective, both for the record and to repeat in some respects what Mr. Sape indicated.

In the equal employment area, we are faced with a multiplicity of ways a person can avail himself if he feels he is being discriminated against; both statutory, regulatory, and administrative relief is possible at every level of Government.

I think it is important to note, to point out, and to bring the OFCCP into context, that it is not the only agency that deals with equal employment matters, nor is the Justice Department or is the EEOC, and indeed were the OFCCP to disappear tomorrow, were the President to assume Executive Order 11246—I might add there is no indication and absolutely no reason to believe that will occur—not one person protected by that order, not one person who has availed himself or herself of the protections in that order would find himself without recourse.

So, in viewing the OFCCP and in viewing the equal employment and affirmative action policy question, we have to bring the program and the concept into some kind of focus.

In doing this, I would first like to address very briefly the regulatory changes which the administration, the Labor Department has proposed.

I think there is no question that back in 1976 you and your colleagues then indicated a personal question as to whether regulatory reform was necessary. The prior administration agreed it was, and after a lengthy study, proposed sweeping regulatory changes. There is no doubt, at least there is a consensus of sorts that change and improvement are necessary and required.

The concern I would have to point out is that the organization I represent holds and, indeed, I hold that the changes proposed by the administration are bureaucratic responses to a deeper problem. There are problems in the administration. I honestly think there is no doubt that it is a burdensome and paper-generated program. Yet the changes recommended seem not to address the underlying reasons for the regulatory burdens but simply address it by lessening the impact, increasing the size of companies subjected to the OFCCP regulations, therefore lessening the number of employers who have to prepare plans and perhaps stretch the time that those plans would have to be current.

On an accounting basis, a small paperwork reduction will be shown, but on a real and meaningful basis, in terms of paperwork burden and bringing some sense to affirmative action, I think there will be little change, if any at all.

What the OFCCP seems to have done, I think, is address the problem by lessening the affected area but not by remedying the source of the affection. So it is the concern of the organization I represent and I believe with others, that the Labor Department focus should rather be pointed to the underlying areas of concern, those as have been summarized by those before me. The critical areas of methodology is one that has been studied, there was a very elaborate and expensive study. The study indicated the eight factor be cast aside. It was determined it had very little relevance in determining availability and the focus should be pointed not on eight factors, mixing and matching things which have no relevance, but rather on determining who is indeed available in the job force now for immediate employment or who is at the stage to be trained.

The impact of this study and its recommendations goes beyond a bureaucratic or paperwork reduction. It merely addresses perhaps, for the first time, the question as to what is affirmative action in employment.

The affirmative action obligation means special outreach, equipment, and special employment considerations. The question is, what persons in our society would avail themselves of this opportunity? To whom would affirmative action be directed? The position of the study commissioned by the previous administration is that at least in employment, in the context of employment alone, that focus should be on those who are employable now or who can be trained for employment.

Recognition I believe that individual employers themselves, it is unrealistic to believe that those employers individually will take on either the aggregate responsibility of society to bring into employment a trainable condition, those who for any reason, educational deprivation or housing problems, whatever the other societal problems we recognize at present, are not ready and available and ready to be employed. I think the two economists who testified previously indicated that was the situation. One of them indicated that the high school diploma indicated a "stick-to-itiveness."

So changing the methodology of determining availability, the bureaucratic response I think would go a long way toward rectifying some of the abuses and complaints of the program, some of the adversarial nature of the program. Knowing that, however, it should be understood that in some respects the definition of affirmative action in the employment context, and although it has never been answered, the problem of who benefits from affirmative action in employment has been one that I am aware of having been subject to great debate. It has never been answered and has been part of the problem of the OFCCP that it never knew who it was supposed to deal with, whom its clients were or what its focus was to be.

Another area of improvement, another area of problems certainly for representatives of the organization I speak for today is that the Government has taken upon itself the requirement that every employer divide its work using the same methodology and applying the very same rigid prescriptions. It is a homogenization of the American work force which has no basis in reality and which causes the problems that Mr. Sape and others have spoken about, in that you have an affirmative action program which might or might not satisfy the Government, but having no relationship, no relevance to your actual personnel system. It sits on the shelf. It is a plan on paper and a plan which in fact is implemented only to the extent to which equal employment and upward mobility and the other personnel functions are carried out.

So, I think it is incumbent upon the committee, and certainly upon the Labor Department, to revise their regulatory priorities, changing the numbers and persons who are covered. As I indicated, they are not the only player in town, and to the extent to which they could in regulatory terms where they have focused in fact upon the large employers, might enable them to do a better job, might enable them to have better coverage. The underlying problems of affirmative action are burdensome and I think overly burdensome of a convoluted nature of the problem, the methodology which perhaps keeps statisticians, econometricians, and demographers wealthy but does not help anybody else. I believe that should be changed.

One other avenue of approach and one other instance of concern that our organization feels against OFCCP is that it has devoted itself almost single-mindedly toward replicating and mirroring what EEOC does and what private litigation does.

As I indicated, they are not the only player in town; unlike perhaps other laws and other protections, there is no gap which they must fill. In repeating what other agencies are geared to do, designed to do without encumbrances of the procurement system which OFCCP must follow, it seems to me they are diminishing their role and diluting the equal employment effort.

The contract compliance program and the Executive order were initially designed to deal with the problem of increasing minority and female employment in Government contracts.

The purpose of the executive order, to the extent which the order finds support in the law, and I think it does, it finds its support as a procurement agency.

As an instance, as the court in the Philadelphia plan said, to assure that the Government has the longest possible clearly qualified employees with which it can perform its work and get its goods and services produced for it.

The OFCCP of late, I think, has simply left that function aside. It has involved itself over the last few years in litigation which has not even devoted itself toward increasing employment. It has engaged in contests with employers as to whether or not computer tapes, tenure discussions, all the minutiae of personnel can be given to the Government. For no other reason than to show that the OFCCP can demand it and retain it without showing its relevance and without showing its need.

The OFCCP has engaged over the last several years in an effort, a very interesting one, to show that it is beyond the law, that there are no constraints upon the Executive order; that title VII, or any other indication of special intent, had any relevance at all to the OFCCP in its own effort.

So there has been extended question as to whether the OFCCP is bound by the Supreme Court's determination that bona fide seniority systems cannot be attacked. There has been extensive litigation over issues such as that. The OFCCP has lost it. Indeed, the D.C. circuit, a panel of judges, recently appointed by President Carter, ruled that obviously the OFCCP must be bound by title VII. I believe your former colleague, now Judge Mikva, wrote the opinion in that decision.

The OFCCP over the last several years has devoted extensive resources to a very difficult position.

Finally, I believe it is important for the purposes of understanding affirmative action that the concept of goals and timetables, miracle standards, the indices of measurement which Professor Alexus talked about has been warned that it is initially rather new. It was only developed in 1969 and 1970 to deal with the problems initially of the Philadelphia plan and then to deal with the problems of measuring progress on the part of larger defense contractors.

The concept, which is over 10 years old, interestingly enough has almost assumed a rather mystical quality in this country. It has, I think, unfortunately become the definition of affirmative action, when it was always meant to be a tool for measuring progress. The concept of affirmative action is so intertwined with goals, and timetables, and standards, they were never meant to become rigid quotas, have indeed in several enforcement cases and in my view the OFCCP's policies today are viewed as sine qua non, the end-all and be-all of affirmative action.

There is an enormous amount of, I think, unfortunate litigation as well as and very widening dismay of their concept of affirmative action.

Mr. **Lorber**. Goals and timetables are a helpful and necessary tool for employers to measure and prioritize their efforts. Without it most large employers would have no idea in any regard how their personnel system is functioning.

It is a concept and a system which I believe has been incorporated in almost every management personnel tool by companies large and small in the country so that as a practical measure goals and timetables have a very different role now than they did 10 years ago.

The chamber of commerce has recently come out in favor of their retention. The problem is the OFCCP and some proponents of affirmative action choose to define it solely in terms of goals and timetables.

Doing that effort, I think, involves a disservice to the cause of affirmative action and, in my view, will possibly develop an atmosphere which will become so offensive to our constitutional standards that a court will not be able to take the liberties the Supreme Court did in the *Weber* case where it chose not to deal with difficult issues and cast the Kaiser plan as a mandatory plan to retain the concept of numerical standards.

It will be an effort as the court did in 11 cases to define the rationale for numerical standards in a way that will not do offense to statutes but the continued effort to phrase affirmative action as goals and timetables will make it difficult for the day-to-day problems to deal with—compliance to which the extent there won't be a case as there was in Kaiser where but for the Government's signing its agreement to the training program which it subsequently did in every instance, the court may not have been able to say that was a solely voluntary plan.

So that affirmative action, in my view and in the view of ASPA, does not simply mean goals and timetables. They are an indication of progress, a tool but not something upon which rests the future existence of affirmative action.

So that in our view the proper role of the OFCCP, a role where it can contribute very significantly to the continued development of minorities and women in employment is a role which will focus upon its initial role as job creator, job monitor, assisting corporations.

It found its genesis in plans and progress in the work force. Now that the protective groups are large, more groups are covered, the role is an even more difficult one, one that the organization should fulfill and hopefully it will but I believe it should fulfill that role in the context where it is understood it is not the only agency in the city dealing with equal employment and, as George Sape indicated, almost every major case in the last 10 years has been private litigation in which the Government has aided in the litigation and I think that will continue.

Mr. **Hawkins**. Thank you.

On page 7, Mr. Lorber, you say:

> Rather than require one job group methodology or even offer one or two options, the OFCCP should allow each employer to decide its own best means of structuring

its work force with the understanding that the employer may have to explain its job group structure if questions arise.

Are you in a sense advocating their voluntary compliance?

Mr. LORBER. No, what I am saying, the current regulatory scheme forces employers to put into slots employees according to a methodology ordained by the Government.

The OFCCP, finding its genesis in an industrial context, views almost every company that it does reviews for as asking, for example, what is their seniority system, their lines of progression? Asking that of professionally devoted companies such as accounting firms or higher level of corporations makes no sense.

Promotions at that level are not done by seniority. There are no lines of progression. Yet, that is the focus of the OFCCP.

The point I make in the testimony is a point submitted to public review years ago, that companies should be allowed to outline the way it actually functions, its actual personnel system without denoting seniority where it may not exist without denoting lines of progression where they may have no meaning.

That is the point. I think what we alluded to in the testimony was some of the regulatory problems which have led to the allegations of an overly burdensome system.

Mr. HAWKINS. If that were to be granted that each company is going to be allowed to use its own methodology and to use whatever method it so desires to comply in its own view with affirmative action, how would you judge the results?

Mr. LORBER. You would judge the results as you do today, you would look at how many minorities and women they had a year ago and how many they have today within their own definitions of their work force and structure and has there been any change according to their own methodology, have they met the burden of showing they are employing numbers of minorities and women as they are represented in the force or are they below that number?

If they are below that percentage, is there any explanation why? Perhaps there is.

Mr. HAWKINS. I misunderstood you then. I thought you were engaged in an argument against numerical compliance.

Mr. LORBER. Not at all. We have said it is something, a measuring tool. The point is simply that and the rigidity of the current program and of the current regulations creating problems with employees—because it makes no sense for them and an undue amount of paperwork and costs are the problems.

That rigidity is serving a disservice and causing as much of the problem as anything else.

Mr. HAWKINS. It seems we are dealing with a problem that didn't arise overnight but has been of longstanding. I think some of the suggestions you have made, although they appear to be very reasonable and I would say I don't disagree with all of them, for each company to organize its own system of complying without any standards whatsoever, then you would get back to the situation where they would do it in such a way as to appear in best compliance with the law itself.

What would keep the company from grouping janitors with executives to give the impression that a company has a great number of minorities without specifying categories?

It has been done. It certainly will be done under any method used. We have companies that have testified before this committee what progress they have made. We have looked at the results of the Federal Government, for example, in terms of how wonderful certain departments are, what great progress they have made and yet when you break it down in terms of classification, you see an obvious concentration in certain classifications.

If you leave the methodology to that particular agency or to a company that believes because it has hired a lot of minorities but over a period of time they are still in that lower classification, then I am sure they would use that as presenting their case to the best appearance they possibly can.

I might agree it would be wonderful for us to have some flexibility—I don't know we could go that far. The Government would be making a mistake to go that far into allowing that type of flexibility and getting away from some standards.

Mr. **Lorber**. First of all, since 1970, I don't think we have tried that system at all. The regulations have not allowed that. I think in the example you gave certainly I would find it very difficult to believe any company could successfully defend such a matching. It would fly in the face of the EEO designations and it would in any neutral context before any adjudicatory body fall so any company attempting that is outlining very boldly the fact it had a serious problem. That would not be sustained.

We certainly expect to the extent anybody had reviewing authority if the system made no sense, if it clearly designed to hide problems or to eliminate progress, which may be illusory at best, the system would have to fall.

Mr. **Hawkins**. You seem to assume a virtue for the corporate sector that no other part of the economy or society enjoys, that every employer is going to be virtuous and comply with the law; that there isn't deliberate discrimination in America, that there is no pervasive discrimination, as a matter of fact, still remaining and it isn't confined to businesses.

It is throughout the society, and to believe that we are going to get that type of compliance it seems to me to be rather naive for us to even discuss, particularly in view of the fact that the possibility of ever being policed or being caught is going to be remote if you go along with the administration's program that you are going to under fund the agency, that you are not going to have the personnel to do it, that you are going to extend the inspections such a long period of time that the possibility of ever being caught is remote. And if they get caught they are not going to suffer anyway because of past discrimination.

You seem to suggest in the prepared testimony that you agree also with increasing the thresholds for requiring affirmative action programs and updates so that by those regulations you are going to exempt significantly over 80 percent of the new job opportunities that are going to be created by small businesses.

You exempt them completely from complying with that part of the law requiring affirmative action programs.

If you put all this together and then on top of that suggest what you are suggesting, it seems to me that you just get down to no enforcement whatsoever and we are back to 15 years ago when there was widespread discrimination prevailing and an encouragement for the few who are going to continue to be the discriminators to go ahead and discriminate.

That is the situation we get into, it seems to me.

Mr. LORBER. Let me answer.

Mr. HAWKINS. I am stating it hypothetically to some extent merely to get that reaction if we can assume that is the situation we are looking to.

What is the explanation? What is the alternative?

Mr. LORBER. First of all, I don't assume purity on the part of corporate America or anybody else. They fully expect that they will be reviewed be it by government, private litigation or their own employees.

They fully expect and are more aware now that labor organizations will be focusing even more deeply upon these problems so I do not believe there is an expectation at all, that they are only engaging in equal employment policies necessarily because it is the right thing to do.

I would add and submit that I don't think today, 1981, that is out of the question but I do not believe and would not submit to this committee or anybody else they are doing it because it is the right thing to do.

There is an understanding if they don't do it they will have significant problems leading to significant disruptions in their work force. Companies which have suffered consent decrees know this is circumscribed dramatically. Certainly as a business proposition they will do good because it is good business and because it is the way with the recommended changes we have submitted and others to meet their legal obligations as well as to get on with their job.

With respect to the OFCCP regulations I would say our testimony took the opposite tack. Personally having been there and having examined this issue, I would question who was the appropriate regulatory response. You don't get that many opportunities to engage in major revision of regulations and we suggested they focus on the reasons for the problem rather than the manifestations which is that small business has a very legitimate problem with paperwork.

If the problems are taken away perhaps there would be no necessity to raise the threshold. That is the focus of that testimony, that they have done it somewhat backward. The real issues have yet to be addressed.

The manifestations of the problems are what they are addressing now. Perhaps they might want to consider doing it the other way. Relieving a lot of the paperwork may take it away. I would imagine it would fall on easy and in my own experience I am led to that conclusion.

With respect to the enforcement level of the government I would point out that regardless of staffing level and funds, any individual employer cannot expect to be reviewed. If you are viewing it on a percentage basis regardless of whether they have 1,100 persons or 1,800, individual employees could simply say they probably won't get to me and they are probably right.

What they can't say is nobody will get to me, or my employees won't raise questions. If they say that they are playing with legal fire which I think will result in a severe burn to them.

Viewing the process as an all-encompassing one does not leave any rational employer secure in thinking the problem is going away. It is not going away.

Now with the evolution of the age act and other problems they are even more susceptible to legal attack. You cannot deal with one problem without a whole host of personnel systems that will lead you into a thicket, be it age, or sex, or handicaps, where employers today have vulnerability.

Level of staffing is important, the level of government involvement is important. The government is still there. I am not aware of any efforts to take the agencies away and to the extent to which there will still be government fostered litigation it will still be there.

A Government suit is still open to private intervention. Even when the Justice Department sues a municipality, certainly there can be foundation for a belief that the problem is going away and, therefore, they can revert to something 15 years ago.

This is 1981. Regardless of the Government, that is the reality, I would submit, on the part of the companies such as ASPA members I represent which are small, medium size.

So I simply don't rest our presentation on the presumed goodwill of American industry at all. I would rest a good part of it on the business sense of industry, on their need to be productive and to have the best work force possible.

I would rest as well on the susceptibility of the Government to be sued itself if it does not carry out its mandate so we are not left with a void. Viewing changes as something that is harmful is quite honestly very counterproductive. Change may be very helpful. We have gone a long passage.

Mr. HAWKINS. You and Mr. Sape both take the view, and you could be right, that most of the problem or a substantial part of it has been solved and that most companies are in compliance, are reasonably set in the methods they use to comply with the law, et cetera.

Would that indicate it would be more disruptive to change it now that everybody is operating within the law and is more familiar with it than you will be with the changes? If we begin to change them now, you will get another administration later and there are more changes. Wouldn't that be more disruptive than not changing?

If things are as good as you report and everybody is doing a reasonably good job familiar with the current system, why change it?

Mr. LORBER. I don't know things are as good. I would say the problems are different. The focus of equal employment is to bring minorities and women into entry level jobs previously excluded to them. These were the problems of the sixties which carried over to the seventies.

I think that aspect of it, if not and certainly not completely eliminated, is under constant review and a great deal of control. There are problems of upward mobility, of female ghettoization in the work force, problems of channeling into areas which may not have upward mobility.

Those are problems but problems of a different nature. They are problems more individualized, less susceptible to the mass of attacks on the segregated seniority system we witnessed for years. Not to say they are less important or less intrusive or less harmful to those who will suffer, simply that they are different, perhaps requiring different methods of attack and remedying the problems.

The concern I see is that viewing any change—I saw that once before with a different perspective—to view that any sort of change represents a retreat, to view that what we have we must keep forever, I think is a very negative attitude.

In some respects I think it is harmful because it focuses the effort of the Government to the extent it is involved, and everybody else, on areas where problems exist but are not pervasive and they simply avoid the other problems.

In dealing with those problems which perhaps should have been the problems focused on initially, we have dealt with one set and now we are dealing with another.

It seems to me some ingenuity could be brought to bear on those problems rather than saying we shall not change anything because we can look at society as a whole and still not see total integration.

That is true, unfortunately, but I don't think that is the area of concern anymore.

Mr. HAWKINS. I assure you this committee will never take the position that no change is needed or desirable. However, we do try to deal with the changes suggested and if they can be defended to support them. Unfortunately, the administration has not seen fit to do what you have done today, to present views and to discuss with us why changes are needed.

If the administration is going to submit regulations and not publicly defend them, obviously I think their changes are suspect to begin with.

Mr. LORBER. When I was director, in my discourse I always found you and your staff to be helpful.

Mr. HAWKINS. We appreciate your candor and we certainly appreciate your testimony. It is very helpful and we certainly hope we can continue to have your views and cooperation with the staff as you have always done.

Thank you very much.

That concludes the hearing today.

[Whereupon, at 1:55 p.m., the subcommittee was adjourned.]

OVERSIGHT HEARINGS ON EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION

Part 1

WEDNESDAY, OCTOBER 7, 1981

House of Representatives,
Subcommittee on Employment Opportunities,
Committee on Education and Labor,
Washington, D.C.

The subcommittee met, pursuant to call, at 9:15 a.m., in room 2175, Rayburn House Office Building, Hon. Augustus F. Hawkins (chairman of the subcommittee) presiding.

Members present: Representatives Hawkins, Washington, Petri, and Fenwick.

Staff present: Susan Grayson, staff director; Edmund D. Cooke, Jr., legislative associate; Terri P. Schroeder, staff assistant; Edith Baum, minority counsel for labor; and Steve Furgeson, legal intern for graduate studies in labor law.

Mr. Hawkins. The Subcommittee on Employment Opportunities of the Committee on Education and Labor is called to order.

This is the final hearing in a series that the subcommittee has conducted in exercising its oversight of Federal enforcement of equal employment opportunity laws. The subcommittee staff is now in the process of preparing a report on these proceedings, which we anticipate releasing in the near future. We wish to express our appreciation for the cooperation and assistance which we have received from the many witnesses.

We will hear this morning from officials of the Department of Labor and Equal Employment Opportunity Commission. We welcome both Mr. Lovell and Mr. Smith, and look forward to their testimony.

Mr. Lovell, Under Secretary of Labor, we welcome you back to the committee. We have enjoyed over a long period of time your friendship and cooperation. We welcome you to your new post, which is certainly not unfamiliar to you. We want to commend the administration for what we consider to be one of its outstanding appointments.

As a personal friend, I am indeed glad to have you before the committee.

STATEMENT OF MALCOLM LOVELL, UNDER SECRETARY, U.S. DEPARTMENT OF LABOR, ACCOMPANIED BY ELLEN M. SHONG, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

Mr. LOVELL. Thank you very much, Mr. Chairman. I am delighted to be here and have the opportunity of working with you again.

I would like to thank you for the opportunity to appear before your subcommittee today to discuss the Department of Labor's contract compliance program. I am accompanied here by Ms. Ellen M. Shong, who is the Director of the Office of Federal Contract Compliance Programs.

The OFCCP is, as you know, the office within the Department of Labor which had day-to-day responsibility for administration and enforcement of the three mandates which make up the contract compliance program—Executive Order 11246, section 503 of the Rehabilitation Act of 1973, and Section 402 of the Vietnam Era Veterans Readjustment Assistance Act.

The primary focus of my testimony will be on our recent comprehensive proposed revisions to the Federal contract compliance regulations. I will also note briefly some of the other initiatives in the contract compliance program area.

Let me note at the outset that we are well aware of your efforts, Mr. Chairman, and the efforts of this subcommittee toward assuring that the contract compliance program lives up to its potential as an instrument to ensure equal employment opportunity for the handicapped, disabled, and Vietnam era veterans, minorities and women.

The administration shares your concern in seeing that the program fulfills the promise it holds for these groups, and we look forward to working with you and your subcommittee to see that it does.

The mandate of the Executive order, enforced by the OFCCP, is that Federal contractors may not discriminate and that they take affirmative action to insure that applicants and employees are treated without regard to race, color, religion, sex, or national origin.

Early in our administration we looked at the enforcement of this program and concluded that it was not working effectively or efficiently. Indeed, as in many other regulatory areas, we found a program which was run in a highly adversarial manner and which principally produced paperwork, aggravation and contempt for the entire affirmative action concept among the contractors trying to adhere to the law, and among the public at large. In response to this situation, we undertook a review and revision of Federal regulations under the Executive order.

Our review indicated a need to reduce compliance burdens, especially for smaller contractors. The regulatory revisions that we have proposed are designed to reduce those burdens without unnecessarily infringing the protections afforded to women, minorities, veterans, and the handicapped.

At the same time, we considered enforcement techniques of the OFCCP that seemed to produce only unnecessary confrontation and data requests, and we considered a "tuneup" of that enforcement vehicle that would continue to provide protection under the law without the Government trying to dictate every detail of a contractor's personnel practices.

Some critical policy decisions remain to be made after analysis of public comment on our advance notice of proposed rulemaking. While I am constrained in discussing determinations not yet made, and at a time when we have not yet had an opportunity to review comments solicited from the public, I am here today to report to you the progress OFCCP has made to date to insure that the mandates of the Executive order are carried out.

First, in these days of tightened budgets OFCCP has determined that it must provide better and faster service to carry out its mission of achieving nondiscrimination by Federal contractors and insuring that contractors take affirmative action. To this end, we have recently instituted several management reforms within OFCCP which we believe will reduce the existing backlog of cases.

As one example, OFCCP has moved quickly in recent weeks to abolish some of the backlog of the 250 appeals to the Director under section 503 of the Rehabilitation Act. Through improved internal procedures, and despite budget reductions, this backlog has begun to subside and should be completely reduced within the next few months.

In addition, we are reviewing the complaint intake process to determine what might be done to allow for earlier determinations of jurisdiction and at least prima facie merit. This will allow OFCCP to more quickly remove from its inventory those complaints which are clearly without merit or over which it has no jurisdiction.

These reforms will also prevent OFCCP from artificially inflating the expectations of complainants it cannot help. The agency will, as a result, be in a better position to obtain a faster resolution of bona fide complaints.

Second, OFCCP has slated increased enforcement efforts regarding the rights of handicapped persons under section 503 of the Rehabilitation Act, and veterans under section 402 of the Vietnam Era Veterans Act. Although the results of increased 503 and 402 enforcement will not be registered for several months, OFCCP is now proceeding vigorously in this area.

Third, OFCCP has moved to renew the emphasis on voluntary compliance by contractors and has sought to eliminate an attitude of confrontation which has beset and weakened its compliance capability. A major criticism frequently heard and often cited as the cause of compliance difficulties is OFCCP's former posture as an adversary.

As I noted above, we intend to change this image and the practice of OFCCP to that of cooperation. We acknowledge, for example, that OFCCP has the capability of annually auditing only a small percentage of the contractor work force. Clearly, comprehensive compliance can only be achieved when contractors police themselves and are given the necessary direction and technical advice from OFCCP.

To this end, OFCCP has begun to meet with "liaison committees" in the regional offices, as well as the national office. These committees are being formed by business groups, special interest groups, and other organizations and have been assured of OFCCP's willingness to meet with them at their initiative to discuss issues of mutual concern.

We expect these committees will provide a forum to exchange technical compliance information and promote a greater understanding of compliance problems. In a spirit of cooperation, we believe greater compliance with affirmative action dictates will be achieved for a greater number of contractors and employees.

Fourth, and perhaps most significant, on August 25, 1981, OFCCP published proposed new regulations for comment. These new regulations were drafted with two basic premises in mind. First, the contractual requirement to undertake affirmative action was not to be compromised. Second, unnecessary paperwork was to be reduced, particularly if it is costly and burdensome to contractors, taxpayers and OFCCP, and if it does not lead to improved job opportunities for minorities, women, handicapped persons, and veterans.

Before outlining some of the major changes the OFCCP has proposed, I think it is important to explain the mandate of the Executive order and how it differs from title VII of the Civil Rights Act and other civil rights laws. This explanation should clarify some of the terminology we will use in our testimony.

The mandate of the Executive order is twofold. First, and like title VII, the Executive order prohibits discrimination in employment. Title VII, however, applies to employers generally, whereas the Executive order applies to employers who are Federal contractors, that is those employers who voluntarily decide to provide goods and services to the Federal Government.

Second, and unlike title VII, the Executive order requires each contractor, as an added contractual condition of being a Federal contractor, to engage in affirmative action, regardless of whether the Federal contractor has been found to have discriminated. The objective of affirmative action is to insure that the employment of protected groups does not vary to a major degree from the availability of their qualified, willing members in the work force.

With this brief background, let me now turn to some of the specifics of the proposed new regulations. I must emphasize again, however, that the new regulations are only proposed and that no final decisions have been made in regard to the proposals.

THRESHOLD CHANGES

OFCCP has proposed to change one of the two "thresholds" of contractor coverage. Currently, OFCCP has jurisdiction over those contractors with $10,000 or more in contracts, and $2,500 in the case of the Rehabilitation Act. Such contractors are prohibited from discrimination in employment and are also required to engage in affirmative action. OFCCP is not proposing to change this basic antidiscrimination threshold in any way.

OFCCP is proposing to change the second threshold relating to written affirmative action programs. Currently, contractors with 50 employees or more and with contracts of $50,000 or more are required to develop detailed written affirmative action programs. These written programs describe the steps which the contractor proposes to take during the year to effectuate its basic affirmative action obligation.

They are lengthy documents which are costly to the contractor to prepare. Their review by OFCCP is costly to Federal taxpayers. Without changing the basic obligation of all contractors, big and small, OFCCP has proposed to reduce this costly paperwork by eliminating the annual document preparation requirement for contractors with less than 250 employees and a contract of under $1 million.

It is important to note that this proposal in no way limits OFCCP's previously existing authority to investigate and prosecute discrimination. The proposal would not limit or change the requirement that contractors demonstrate good faith compliance efforts or deprive the OFCCP of the authority to conduct full scale compliance reviews of even the smaller contractors with only $10,000 or more in contracts.

Thus, OFCCP would continue to have jurisdiction over those small contractors with more than $10,000 but with less than $1 million in Federal contracts. If an employee from a small contractor files a complaint with OFCCP, the agency could and would investigate that contractor or refer the matter to the EEOC for investigation.

In no sense is OFCCP abandoning its jurisdiction over Federal contractors, and in no way is it reducing its moral commitment to provide affirmative action for protected employees of Federal contractors.

Rather, this proposal is a narrow one designed to require only contractors with large Federal contracts to be put to the additional burden of annually preparing a detailed written affirmative action program.

It is significant, too, that under the change regarding written affirmative action program threshold, nearly 77 percent of the employees currently included in affirmative action programs would continue to be included. At the same time, of the 17,000 contractors which must now prepare written affirmative action programs, only 4,000 contractors would be required to do so under the proposal.

Since the 13,000 contractors who would be exempted from filing annual plans under this proposal only employ 23 percent of the employees presently covered by such plans, this change would both reduce costly paperwork for small contractors and permit OFCCP to conserve enforcement resources for use with the contractors who have the most jobs to offer.

Although this change will bring about significant paperwork relief to many contractors, it does not in any way impair OFCCP's present jurisdiction over all currently covered contractors and employees, or prospective employees of those contractors.

REQUIREMENT TO SET GOALS

The regulations require that contractors set a goal for each job group in which minorities or women are underutilized. Underutilization is a term unique to the OFCCP regulatory program. It is not a finding of discrimination; rather it means that a contractor currently employs demonstrably fewer qualified women or minorities than reasonably might be expected by virtue of their qualifications, willingness and availability for the work in question. It is the existence of underutilization that triggers the requirement to set a goal to correct the underutilitization.

Although the existing regulations do not further explain this term, the OFCCP's past enforcement efforts were aimed at forcing a contractor to declare itself underutilized and to set a goal in the event of any numerical disparity between availability and existing utilization, even if that disparity was not statistically significant. In some cases this insistence on the part of the agency resulted in a contractor, in effect, having to set a goal for a part of a person. Needless to say this both strained the credibility of our efforts as well as reducing serious confrontation with contractors.

The proposed regulations provide a rational and statistically sound measure of reasonable utilization. Absent other compelling circumstances as determined by the Director, a contractor would not be required to declare itself underutilized or to set a goal for job groups in which the employment of women and minorities is at least 80 percent of their availability.

This does not mean that the administration only wants to provide 80 percent of the coverage which previously existed. Rather this proposal reflects the fact that our statistical methods of determining the overall availability of certain groups in the labor market are not precise to the decimal point, and that contractors should have some leeway in responding to the composition of their work force for perfectly legitimate and practical reasons.

CONSOLIDATED WRITTEN AFFIRMATIVE ACTION PROGRAMS.

OFCCP is proposing to permit contractors to prepare one consolidated program for all facilities subject to the same personnel control. This change is designed to reduce repetitious and burdensome program writing without sacrificing any of the truly necessary core program elements which affect all employees.

For example, a contractor preparing a consolidated program would be required in all circumstances to display statistical analyses of each facility. As a result, there will be no possibility for a contractor to hide the fact that it maintains a segregated facility or one in which minorities or women are underutilized.

ELIMINATION OF HOW TO DO IT REGULATIONS

OFCCP is proposing to eliminate subpart C of its existing regulations. That section sets out burdensome and often inflexible requirements for contractors concerning ways to accomplish affirmative action in general.

This change is intended to reduce the opportunity for confrontation in what contractors term as "boilerplate" affirmative action language. The change would not lessen enforcement capability in any way.

Specifically, what OFCCP has proposed to eliminate are the provisions that a contractor demonstrate that it has published stories of affirmative action in in-house newsletters, that regular meetings with employees have been held, that affirmative action policies have been disseminated internally and that it has identified problem areas.

OFCCP continues to suggest to contractors that they undertake these affirmative action efforts and other such initiatives if they make sense for the particular facility involved and the affirmative action problems it is experiencing.

Although always permissive, these provisions have frequently been applied as mandatory, resulting not only in unnecessary confrontation but in an unwarranted and counterproductive focus on process rather than performance. This would no longer be the case.

More importantly, such required steps, when inflexibly applied by Government bureaucrats, harm the goal of achieving genuine cooperation from contractors and public support for the entire affirmative action program. This administration cares more about fostering and achieving real equal opportunity in the workplace than about making contractors publish newsletters.

FIVE-YEAR AFFIRMATIVE ACTION PROGRAM APPROVAL.

In an effort to create incentives to comply and to provide greater training benefits to protected group members, OFCCP is proposing to approve for 5 years, instead of 1 year, those written affirmative action programs which comply with the Executive order, and which in addition include an approved training program.

This emphasis on training is a new concept and again underscores OFCCP's commitment to the attainment of jobs for protected class members and its desire to cooperate with contractors which are willing to take positive steps in this direction.

At the same time, OFCCP is not proposing to turn its back on employees of those contractors granted 5-year compliance certificates. Rather, OFCCP would retain jurisdiction to investigate complaints and would retain the authority to revoke certifications for substantive breaches of all 5-year certification agreements.

In addition, contractors would be obligated to report to OFCCP on an ongoing basis regarding any changes in the affirmative action program or training programs for protected group members during the 5-year approval period.

I would like to pause now to share with the committee some philosophical views which I share with both Secretary Donovan and with the Director of the OFCCP, Ms. Shong. I think these views provide a useful framework for the evaluation of the changes this administration has proposed.

First, as I indicated in my introductory remarks, we believe that the mission of the OFCCP is to insure that Government contractors' affirmative action efforts produce real equal opportunity in the workplace, and that the employment of protected groups does not vary to a major degree from the availability of their qualified, willing members in the workforce.

To the extent that the agency has in the past concentrated on form rather than substance, and the recent past is replete with such examples, it has lost sight of that mission. More importantly, it may well have encouraged some contractors to lose sight of this fundamental objective because its enforcement was frequently geared not to the contractors' performance, but to the process of demonstrating "compliance." This allowed many contractors who were not making satisfactory progress to use the agency's preoccupation with process to obfuscate their performance in this regard. It also subjected the agency to justifiable criticism from contractors who were increasing opportunities for the protected groups that the agency was not interested in those results so much as it was interested in the manner of achieving the results.

Second, we believe that many of the current regulations and previous enforcement strategies not only failed to further the objective of jobs but in fact compelled a focus on form rather than substance. Our regulatory proposals and management initiatives are designed specifically to eliminate those elements of concentration on process and to return us to a focus on performance.

Everything OFCCP has done, and everything it plans to do is designed to streamline the burden of demonstrating and measuring compliance so that contractors can help fulfill the national goal of full participation of all people in all segments of economic activity on the basis of availability, individual interest and merit, and not on account of race, color, religion, sex, national origin, handicap, or veteran status.

Our elimination of pre-award reviews, for example, changes only the timing of our monitoring activities, not the results of that activity. Providing incentives for contractors who undertake significant training efforts focuses again on the primary objective of employment of the protected groups. I know you will recall other examples in my earlier remarks.

At the same time we have recognized that the proper role for Government, indeed the only defensible role, is to insist that Government contractors ferret out and eliminate artificial barriers to achievement of equality of opportunity, thereby insuring that their employment policies and practices are in fact nondiscriminatory.

Outreach and recruitment to include minorities and women, and goals to measure progress toward achieving equivalent participation are proper and defensible. Selection of the unneeded or unqualified, however, is not defensible. Preferential treatment or quotas—including measures by any other name that constitute quotas—are not proper or defensible, absent proof of discrimination.

Although we continue to require that contractors set goals where there is not a reasonable utilization of the available minorities or women, we will not insist on or support anything that operates as a quota.

Certainly there have been changes in the manner in which OFCCP operates. Where we found a regulation with a focus on compliance process rather than on performance, where we have found a system without rationality, where we found an enforcement strategy based on sentiment rather than law and reason, we are proposing changes. But one thing has not and will not change, and that is our commitment to the citizens of this country to eliminate unlawful discrimination from the workplace.

The conclusion by some commentators that the Reagan administration is going to sell out on affirmative action under the Executive order is wrong. Improved management of the OFCCP and sound regulatory reform stand as proof of the agency's continued commitment to equal employment opportunity.

In fact, we believe that the changes which we are making will produce more jobs over time for minorities and women while preserving the support of the American people for the goal of equal opportunity for all. And equal opportunity is justice for all.

In the months ahead, we will be looking for other ways to improve the contract compliance program. In this regard, let me say that we would welcome any suggestions which you or your subcommittee wish to offer.

This concludes my prepared testimony. Ms. Shong and I would be pleased to respond to any questions.

Mr. HAWKINS. Thank you, Mr. Lovell.

[The prepared statement of Malcolm Lovell follows:]

Prepared Statement of Malcolm Lovell, Under Secretary, U.S. Department of Labor, Accompanied by Ellen M. Shong, Director, Office of Federal Contract Compliance Programs

Mr. Chairman and members of the subcommittee, Thank you for the opportunity to appear before your Subcommittee today to discuss the Department of Labor's contract compliance program. I am accompanied here today by Ms. Ellen M. Shong, Director of the Office of Federal Contract Compliance Programs (OFCCP). The OFCCP is, as you know, the office within the Department which has day-to-day responsibility for administration and enforcement of the three mandates which make up the contract compliance program—Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 and Section 402 of the Vietnam Era Veterans Readjustment Assistance Act.

The primary focus of my testimony will be on our recent comprehensive proposed revisions to the Federal contract compliance regulations. I will also note briefly some of our other initiatives in the contract compliance program area.

Let me note at the outset that we are well aware of your efforts, Mr. Chairman, and the efforts of this Subcommittee toward assuring that the contract compliance program lives up to its potential as an instrument for ensuring equal employment opportunities for the handicapped, disabled and Vietnam era veterans, minorities and women. The Administration shares your concern for seeing that the program fulfills the promise it holds for these groups, and we look forward to working with you and your Subcommittee to see that it does.

The mandate of the Executive Order, enforced by the OFCCP, is that federal contractors may not discriminate and that they take affirmative action to ensure that applicants and employees are treated without regard to race, color, religion, sex or national orgin. Early in our Administration, we looked at the enforcement of this program and concluded that it was not working effectively or efficiently. Indeed, as in many other regulatory areas, we found a program which was run in a highly adversarial manner and which principally produced paperwork, aggravation and contempt for the entire affirmative action concept among the contractors trying to adhere to the law and among the public at large. In response to this situation, we undertook a review and revision of federal regulations under the Executive Order.

Our review indicated a need to reduce compliance burdens, especially for smaller contractors. The regulatory revisions that we have proposed are designed to reduce those burdens without unnecessarily infringing the protections afforded to women, minorities, veterans and the handicapped. At the same time, we considered enforcement techniques of the OFCCP that seemed to produce only unnecessary confrontation and data requests, and we considered a "tune-up" of that enforcement vehicle that would continue to provide protection uner the *law* without the government trying to dictate every detail of a contractor's personnel practices. Some critical policy decisions remain to be made after analysis of public comment on our advance notice of proposed rulemaking. While I am constrained in discussing determinations not yet made and at a time when we have not yet had an opportunity to review comments solicited from the public, I am here today to report to you the progress OFCCP has made to date to ensure that the mandates of the Executive Order are carried out.

First, in these days of tightening budgets OFCCP has determined that it must provide better and faster service to carry out its mission of achieving nondiscrimination by federal contractors and ensuring that contractors take affirmative action. To this end, we have recently instituted several management reforms within OFCCP which we believe will reduce the existing backlog of cases. As one example, OFCCP has moved quickly in recent weeks to abolish some of the backlog of the 250 appeals to the Director under Section 503 of the Rehabilitation Act. Through improved internal processing procedures and despite budget reductions, this backlog has begun to subside and should be completely reduced within the next few months.

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Third, OFCCP has moved to renew the emphasis on voluntary compliance by contractors and has sought to eliminate an attitude of confrontation which has beset and weakened its compliance capability. A major criticism frequently heard and often cited as the cause of compliance difficulties is OFCCP's former posture as an adversary. As I noted above, we intend to change this image and the practice of OFCCP to that of cooperation. We acknowledge, for example, that OFCCP has the capability of annually auditing only a small percentage of the contractor workforce. Clearly, comprehensive compliance can only be achieved if contractors police themselves and are given the necessary direction and technical advice from OFCCP.

To this end, OFCCP has begun to meet with "Liaison Committees" in the regional offices, as well as the National Office. These Committees are being formed by business groups, special interest groups or other organizations and have been assured of OFCCP's willingness to meet with them at their initiative to discuss issues of mutual concern. We expect these Committees will provide a forum to exchange technical compliance information and promote a greater understanding of compliance problems. In a spirit of cooperation, we believe greater compliance with affirmative action dictates will be achieved for a greater number of contractors and employees.

Fourth, and perhaps most significantly, on August 25, 1981 OFCCP published proposed new regulations for comment. These new regulations were drafted with two basic premises in mind. First, the contractual requirement to undertake affirmative action was not to be compromised. Second, unnecessary paperwork was to be reduced, particularly if it is costly and burdensome to contractors, taxpayers and OFCCP, and if it does not lead to improving job opportunities for minorities, women, handicapped persons and veterans.

Before outlining some of the major changes the OFCCP has proposed, I think it is important to explain the mandate of the Executive Order and how it differs from Title VII of the Civil Rights Act and other civil rights laws. This explanation should clarify some of the terminology we will use in our testimony.

The mandate of the Executive Order is two-fold. First, and like Title VII, the Executive Order prohibits discrimination in employment. Title VII, however, applies to employers, generally, whereas the Executive Order applies to employers who are federal contractors, that is those employers who voluntarily decide to provide goods or services to the federal government.

Second, and unlike Title VII, the Executive Order requires each contractor, as an added contractual condition of being a federal contractor, to engage in affirmative action, regardless of whether the federal contractor has been found to have discriminated. The objective of affirmative action is to insure that the employment of protected groups does not vary to a major degree from the availability of their qualified, willing members in the workforce.

With this brief background, let me now turn to some of the specifics of the proposed new regulations. I must emphasize again, however, that the new regulations are only proposed and that no final decisions have been made in regard to the proposals.

1. THRESHOLD CHANGES

OFCCP has proposed to change one of the two "thresholds" of contractor coverage. Currently, OFCCP has jurisdiction over those contractors with $10,000 or more in contracts ($2,500 in the case of the Veterans Act). Such contractors are prohibited from discrimination in employment and are also required to engage in affirmative action. OFCCP is not proposing to change this basic anti-discrimination threshold in any way.

OFCCP is proposing to change the second threshold relating to written Affirmative Action Programs. Currently, contractors with 50 employees or more and with contracts of $50,000 or more are required to develop detailed written Affirmative Action Programs. These written programs describe the steps which the contractor proposes to take during the year to effectuate its basic affirmative action obligation. They are lengthy documents which are costly to the contractor to prepare. Their review by OFCCP is costly to Federal taxpayers. Without changing the basic obligations of all contractors, big and small, OFCCP has proposed to reduce this costly paperwork by eliminating the annual report requirement for contractors with less than 250 employees and a contract of under $1 million.

It is important to note that this proposal in no way limits OFCCP's previously existing authority to investigate and prosecute discrimination. This proposal also would not limit or change the requirement that contractors demonstrate good faith compliance efforts or deprive the OFCCP of the authority to conduct full scale compliance reviews of even the smaller contractors with only $10,000 or more in contracts.

Thus, OFCCP would continue to have jurisdiction over those small contractors with more than $10,000 but with less than $1 million in federal contracts. If an employee from a small contractor files a complaint with OFCCP, the agency could and would investigate that contractor or refer the matter to the EEOC for investigation. In no sense is OFCCP abandoning its jurisdiction over federal contractors and in no way is it reducing its moral commitment to provide Affirmative Action for protected employees of federal contractors.

Rather, this proposal is a narrow one designed to require only contractors with large federal contracts to be put to the additional burden of annually preparing a detailed written Affirmative Action Program. It is significant too that under the change regarding written Affirmative Action Program threshold, nearly 77 percent of the employees currently included in Affirmative Action Programs would continue to be included. At the same time, of the 17,000 contractors which must now prepare written Affirmative Action Programs, only 4,000 contractors would be required to do so under the proposal.

Since the 13,000 contractors who would be exempted from filing annual plans under this proposal only employ 23 percent of the employees presently covered by such plans, this change would both reduce costly paperwork for the small contractors and permit OFCCP to conserve its enforcement resources for use with the contractors who have the most jobs to offer. Although this change will bring about significant paperwork relief to many contractors, it does not in any way impair OFCCP's present jurisdiction over all currently covered contractors and employees, or prospective employees of those contractors.

2. REQUIREMENT TO SET GOALS

The regulations require that contractors set a goal for each job group in which minorities, whites, women or men are "underutilized." Underutilization is a term unique to the OFCCP regulatory program. It is not a finding of discrimination; rather it means that a contractor currently employs demonstrably fewer qualified women or minorities than reasonably might be expected by virtue of their qualifications, willingness and availability for the work in question. It is the existence of underutilization that triggers the requirement to set a goal to correct that underutilization. Although the existing regulations do not further explain this term, the OFCCP's past enforcement efforts were aimed at forcing a contractor to declare itself underutilized and to set a goal in the event of any numerical disparity between availability and existing utilization, even if that disparity was not statistically significant. In some cases this insistence on the part of the agency resulted in a contractor, in effect, having to set a goal for a part of a person. Needless to say this strained both the credibility of our efforts as well as producing serious confrontation with contractors.

The proposed regulations provide a rational and statistically sound measure of reasonable utilization. Absent other compelling circumstances as determined by the Director, a contractor would not be required to declare itself underutilized or to set a goal for job groups in which the employment of women and minorities is at least 80 percent of their availability. This does not mean that the Administration only wants to provide 80 percent of the coverage which previously existed. Rather, this proposal reflects the fact that our statistical methods of determining the overall availability of certain groups in the labor market are not precise to the decimal point, and that contractors should have some leeway in responding to the composition of their workforce for perfectly legitimate and practical reasons.

3. CONSOLIDATED WRITTEN AFFIRMATIVE ACTION PROGRAMS

OFCCP is proposing to permit contractors to prepare one consolidated Program for all facilities subject to the same personnel control. This change is designed to reduce repetitious and burdensome Program writing without sacrificing any of the truly necessary core Program elements which affect all employees. For example, a contractor preparing a consolidated Program would be required in all circumstances to display statistical analyses of each facility. As a result, there will be no possibility for a contractor to hide the fact that it maintains a segregated facility or one in which minorities, whites, women or men are underutilized.

4. ELIMINATION OF "HOW TO DO IT" REGULATIONS

OFCCP is proposing to eliminate Subpart C of its existing regulations. That section sets out burdensome and often inflexible requirements for contractors concerning ways to accomplish affirmative action in general. This change is intended to reduce the opportunity for confrontation in what contractors term as "boiler plate" affirmative action language. The change would not lessen enforcement capability in any way.

Specifically, what OFCCP has proposed to eliminate are the provisions that a contractor demonstrate that it has published stories of affirmative action in in-house newsletters, that regular meetings with employers have been held, that affirmative action policies have been disseminated internally and that it has identified problem areas. OFCCP continues to suggest to contractors that they undertake these affirmative action efforts and other such initiatives if they make sense for the particular facility involved and the affirmative action problems it is experiencing.

Although always permissive, these provisions have frequently been applied as mandatory, resulting not only in unnecessary confrontation but in an unwarranted and counterproductive focus on process rather than performance. This would no longer be the case. More importantly, such required steps, when inflexibily applied by government bureaucrats, harm the goal of achieving genuine cooperation from contractors and public support for the entire affirmative action program. This Administration cares more about fostering and achieving real equal opportunity in the workplace than about making contractors publish newsletters.

5. 5-YEAR AFFIRMATIVE ACTION PROGRAM APPROVAL

In an effort to create incentives to comply and to provide greater training benefits to protected group members, OFCCP is proposing to approve for five years (instead of one year) those written Affirmative Action Programs which comply with the Executive Order and which in addition include an approved training program. This emphasis on training is a new concept and again underscores OFCCP's commitment to the attainment of jobs for protected class members and its desire to cooperate with contractors which are willing to take positive steps in this direction.

At the same time, OFCCP is not proposing to turn its back on employees of those contractors granted five year compliance certifications. Rather, OFCCP would retain jurisdiction to investigate complaints and would retain the authority to revoke certifications for substantive breaches of all five year certification agreements. In addition, contractors would be obligated to report to OFCCP on an ongoing basis regarding any changes in the Affirmative Action Program or training programs for protected group members during the five year approval period.

I would like to pause now to share with the Committee some philosophical views which I share with both Secretary Donovan and the Director of the OFCCP. I think these views provide a useful framwork for the evaluation of the changes this Administration has proposed.

First, as I indicated in my introductory remarks, we believe that the mission of the OFCCP is to ensure that government contractors' affirmative action efforts produce real equal opportunity in the workplace, and that the employment of protected groups does not vary to a major degree from the availability of their qualified, willing members in the workforce.

To the extent that in the past the agency has concentrated on form rather than substance (and the recent past is replete with such examples) it has lost sight of that mission. More importantly, it may well have encouraged some contractors to lose sight of this fundamental objective because its enforcement was frequently geared not to contractors' performance, but to the process of demonstrating "compliance." This allowed many contractors who were not making satisfactory progress to use the Agency's preoccupation with process to obfuscate their performance in this regard. It also subjected the agency to justifiable criticism from contractors who were increasing opportunities for the protected groups that the agency was not interested in those results so much as it was interested in the manner of achieving the results.

Second, we believe that many of the current regulations and previous enforcement strategies not only failed to further the objective of jobs but in fact compelled a focus on form rather than substance. Our regulatory proposals and management initiatives are designed specifically to eliminate those elements of concentration on process and to return us to a focus on performance.

Everything OFCCP has done and everything it plans to do is designed to streamline the burden of demonstrating and measuring compliance so that contractors can help fulfill the national goal of full participation of all peoples in all segments of economic activity on the basis of availability, individual interest and merit, and not on account of race, color, religion, sex, national origin, handicap or veteran status.

Our elimination of pre-award reviews, for example, changes only the timing of our monitoring activities, not the results of that activity. Providing incentives for contractors who undertake significant training efforts focuses again on the primary objective of employment of the protected groups. I know you will recall other examples in my earlier remarks.

At the same time we have recognized that the proper role for government, indeed the only defensible role, is to insist that government contractors ferret out and eliminate artificial barriers to achievement of equality of opportunity, thereby ensuring that their employment policies and practices are in fact non-discriminatory. Outreach and recruitment to include minorities and women and goals to measure progress toward achieving eqivalent participation are proper and defensible. Selection of the unneeded or the unqualified, however, is not defensible. Preferential treatment or quotas—including measures by any other name that constitute quotas—are not proper or defensible, absent proof of discrimination.

Although we continue to require that contractors set goals where there is not a reasonable utilization of the available minorities or women, we will not insist on or support anything that operates as a quota.

Certainly there have been changes in the manner in which OFCCP operates. Where we found a regulation with a focus on compliance process rather than on results, where we found a system without rationality, where we found an enforcement strategy based on sentiment rather than law and reason, we are proposing changes. But one thing has not and will not change, and that is our commitment to the citizens of this country to eliminate unlawful discrimination from the workplace.

The conclusion of some commentators that the Reagan Administration is going to "sell out" on affirmative action under the Executive Order is wrong. Improved management of the OFCCP and sound regulatory reform stand as proof of the agency's continued commitment to equal employment opportunity. In fact, we believe that the changes which we are making will produce more jobs over time for minorities and women while preserving the support of the American people for the goal of equal opportunity for all. And equal opportunity is justice for all.

In the months ahead we will be looking for other ways to improve the contractor compliance program. In this regard, let me say that we would welcome any suggestions which you or your Subcommittee wish to offer.

This concludes my prepared testimony. We would be pleased to respond to any questions.

Mr. HAWKINS. Ms. Shong, do you care to supplement the statement of Mr. Lovell in any way?

Ms. SHONG. No, Mr. Chairman, but I will be glad to respond to questions.

Mr. HAWKINS. Thank you.

Mr. Lovell, I cannot say that I disagree entirely with your prepared statement in its broad sweep. However, one of the things that the committee has called attention to, I think, persistently has been that all the proposed changes seem to move in one direction only. Collectively, you have, I think, very well covered the various changes, but the impact of them would be that they amount to exemption of smaller employers. Perhaps taken alone that might not be so serious, but in addition to that the committee has looked with some degree of reservation on the difference in the setting of goals.

In addition to that, you have suggested that consolidated written affirmative action programs be changed, whether we construe to be weakening or not, I think certainly they are not, in the opinion of some of us, strengthening them. You have suggested eliminating certain regulations pertaining to examples of how some of these objectives are to be accomplished.

In other words, the changes seem to be moving only in one direction, yet the conclusion is reached that in some way, and the phrase is used, "real equal opportunity" in the workplace will be assured. Yet, not one has explained to the committee in what way the situation of those who are discriminated against will be improved, against all of the changes that are being suggested, which collectively seem to be moving only in one direction, and that is to ease the burden on the employer, which obviously would be the one who would be doing the discriminating.

It is very difficult to understand in what way real equal opportunity in the workplace will be improved merely through removing some of the burdens that are now alleged to be placed on those who were the ones who would be discriminating in the workplace.

May I parenthetically say that we would join you in removing some of those burdensome regulations on a case by case basis. However, we don't see one instance in which we think the enforcement will be improved in any way.

Would you care to comment on why it is that nothing has been, at least in the view of some of us, considered that would strengthen the case against those who would discriminate?

Mr. LOVELL. Your question is an excellent one. I think to an important degree it differentiates between the philosophy of various groups, all of which are committed to equal employment opportunity, but who have chosen to pursue different goals in reaching it.

Social engineering is a very inexact science. It almost makes economics look exact. We really don't know that well how various efforts work in this regard. But we are a free society, and in the final analysis, whether we have equal opportunity or not is going to depend on the determination of the people in that society to achieve that goal.

What we are trying to do in the changes we have made is to encourage the individuals and the corporations that basically must take the action to achieve this equal opportunity in the workplace, to encourage them to do it.

I am just going to give you a personal judgment here, Mr. Chairman. I believe that the main reason this Nation has moved with the determination that we have, and with the many favorable results we have in bringing minorities and women, particularly, into the work force, is a moral judgment on the part of all of our people that this is the thing to do.

It has been implemented in a number of ways by laws and regulations, but none of these would stand much chance of working if the people were not behind it. We have had examples of that. Prohibition is probably one of the most outstanding ones, where the laws in themselves were not adequate to achieve an objective that people did not want.

I am convinced that the people of this country do want equal opportunity. I think that they do want to have a race-free, sex-free environment where people are chosen on their interest, merit, and willingness to work, the capacity to work. I also think that it is not always so, but we have moved in a very important degree in the last 15 years toward breaking down some of the old prejudices and some of the old barriers.

I am not suggesting that all those old barriers and prejudices have been eliminated. But I am saying that the determination of the American people has not yet weakened in this regard, and I think a lot of the things that we are doing here is recognizing that we are not dealing with 1960 or 1950, but we are dealing with 1981 where the vast majority of people in this country do want to see this kind of effort prevail.

Therefore, the steps that we are taking are in the direction of encouraging a more voluntary cooperation toward these perceived goals. Obviously, in anything of this character, there are going to be exceptions, and we do say, and we make it very clear, where there is a complaint, even among some of those smaller companies, we will respond to that complaint, and we take action in the event that that company is proved to have violated the regulations, or the Executive order.

So we are not abandoning it. We are putting more reliance on voluntary cooperation, but we are not disbanding the police force. We may be cutting down on the numbers of beats that they monitor, but they are still available if you call the number.

Mr. HAWKINS. Starting with your last statement there. We appreciate the fact that you propose to do this monitoring and to deal with the various problems on a more specific basis. But how does that square with the fact that the resources of the agency will be reduced which adds again to the movement in only one direction.

When the number of enforcers will be reduced, isn't this a clear indication to those who might be prone to discriminate that they will be less likely to be caught.

Mr. LOVELL. We think not.

Mr. HAWKINS. I don't see, with the reduction in force that you have, how you will be able to do an adequate job certainly of dealing with the various problems as they arise.

If you provide all the exemptions and the softening of the various requirements to the point that has been made, then you reduce also the number of those who will be monitoring the process, or to be made available even for technical assistance. If you reduce that number, you are moving again in that same direction.

Mr. LOVELL. In recent days and weeks, Mr. Chairman, I have heard that argument from almost every sector at the Department of Labor. As you know, in the entire Government, we are reducing the number of employees, and reducing the amount of money we are spending on our efforts.

Everybody thinks that when you stop spending so much money and reducing the number of people, the efforts automatically must become less effective. Fortunately, that is not always sound, in fact it is usually not so.

In my former life with the Rubber Manufacturers Association, we had to reduce our staff by 20 percent, and I was rather appalled a year later to find we were doing just as much work and doing it just as efficiently, perhaps even a little more efficiently because the people that remained were determined that we would not undergo that kind of experience again.

I think that it is going to be possible, not only in our OFCCP, but in the operation of all the programs at the Department of Labor, to maintain the level of integrity of our performance even with the reduced staff.

I think the main point, Mr. Chairman, is the one I made a little earlier, that no program of this kind, whether you tripled the staff or quadrupled the staff, or increased it ten-fold, could possibly begin to deal with the thousands of employers that are affected by the regulations and the Executive order. We must have a general sense, a willingness to comply. In addition to that, you have to have a process by which those who choose to disregard that, where they cannot proceed in utter disregard of the law.

The basic reliance does have to be on the fact that it is part of the direction this society is moving to achieve equal employment opportunity, and to give our free society an opportunity to show that they really mean it and that they can do it.

We are going to have to stand in judgment in terms of what we do 3½ years from now, perhaps 4 years after that, but we are prepared to do that. That is what we want to be judged on, not how much money we spend, or what kind of commitments we make, but what sort of country this is going to be at that time. We are convinced, at least to the best of our ability, these steps that we are taking will take us in that direction.

We also recognize, obviously we are human beings working in a political milieu, it is not always the easiest thing to do to be right all the time. But I think we are a lot closer to it than we have been for some years in our society.

As we proceed down this path, we do hope to work with you and the members of this committee and the members of the committee in the other House, so that by working together and taking a look at where we are going, and trying to make adjustments where they are necessary, we will have a better country in this area.

Mr. Hawkins. On page 17, Mr. Lovell, you indicate in the second paragraph that the elimination of preaward reviews, for example, changes only the timing of monitoring activities and not the results of that activity.

I assume that the monitoring will take place after the award has been made, and that you intend to provide much more monitoring after the award has actually been made. I assume that is the thrust of your statement?

Mr. Lovell. Ms. Shong, would you answer that, please?

Ms. Shong. Mr. Chairman, if I might comment on your earlier question as well as this question.

Currently, the Executive order coverage extends to approximately 103,000 facilities and 17,000 contractors. We have never been able to review but a small percentage of those contractor facilities.

One of the things that made it even more difficult for us to review with any frequency or recency a cross section of contractor facilities was the preaward review. We found ourselves looking at the same contractors and the same contractor facilities repeatedly. Consequently, there were facilities and there were contractors who had never gone through a compliance review process.

The elimination of the preaward very importantly gives us the management right and responsibility to allocate our diminishing resources in a way to cover the most ground, to look at contractors, perhaps, who have never been reviewed before, or who have not had a review very recently.

The timing of that compliance review for all contractors will be based certainly upon the size of their Government contract, the significance of that contractor in the labor community in which it exists, and the number of outstanding and unresolved complaints filed against that contractor—all the rational criteria that we use to exercise our discretion in a way to get the most out of our resources.

Mr. **Hawkins**. The question I was going to address to you was, what better time is there to weed out those who are prone to discriminate than at the time when that party is bargaining for the contract?

In other words, would you also exempt at that time those who are bidding on a contract who, let us say, would not agree to comply with the quality of material that might go into a contract?

In other words, at the time of bidding on the contract, the commitment not to discriminate is only one of many provisions for the selection of the contractor. You are not, then, treating the commitment not to discriminate in a different way from the others? You are not going to say to a contractor, you may use any type of material in the fabrication of a product. You certainly would insist that that provision be upheld.

You are not going to say:

> We are going to monitor you after you get the contract, therefore, we are going to let bidders bid without any specificity as to the provisions that go into the contract. It seems to me that here you have an individual who comes forth to obtain business from the Federal Government at taxpayers' expense, and it would seem to me that a commitment at that time would relieve you of that responsibility.

You say, "in spite of diminishing resources to monitor the contractor," it would relieve you of that responsibility to some extent because it is at that time that the burden is placed on the contractor to insure that that part of the contract is going to be complied with.

You are letting the individual, then, go scott free, and then you say, "But if you later discriminate, or if you later engage in any unlawful practices, we are going to be watching you." So you have in a sense, it seems to me, discouraged compliance.

Mr. **Lovell**. I think most contractors realize when they sign a contract with the Federal Government, that they are going to be expected to live up to to all aspects of the contract.

I am really not an expert in that field, but my recollection would be, if you sign a contract with a company to provide spark plugs for the military, they don't necessarily inspect the factory. They don't necessarily make sure that the fair labor standards regulations are being properly enforced. That is part of the law. They make a commitment to obey the law. They are subject to review under the law as anyone else who is covered by it.

I would think that there may be times when we might want to do a preaward review, if a company had a bad reputation, and historically it performed in an unusual manner. I think in most instances when a company agrees to a clause of the contract, you take them at their word that they understand the meaning of it, and they will indeed perform as they are expected to.

Mr. HAWKINS. I suppose you have more faith in human beings, Mr. Lovell, than I think most of us do.

Mr. LOVELL. I find I have more faith in human beings than most people I deal with, but I think I have been right more than they have.

Mr. HAWKINS. I pride myself on being somewhat moralistic, too. But if I get on the highway and drive 75 miles an hour, I am violating the law. The only thing that stops me in some places is that I know the law is vigorously enforced. I obey it because I know I am going to get stopped. It is that fear, perhaps, that causes me to be a little bit more law abiding. I think that is human nature.

Mr. LOVELL. You also obey it because you know if you drive at that speed all the time, when you have an accident you are more apt to be killed, too. So there is another kind of fear.

Mr. HAWKINS. I don't think of that when I get behind the wheel.

Mr. Washington.

Mr. WASHINGTON. Thank you, Mr. Chairman.

I also want to welcome you, Mr. Lovell, and Ms. Shong. It is a pleasure seeing you here this morning.

You realize, of course, and perhaps better than I do that Congress has oversight responsibilities within the scope of the Office of Federal Contract Compliance programs.

Mr. LOVELL. Yes, sir.

Mr. WASHINGTON. The committee takes these responsibilities very seriously. Consequently, we have an obligation and a right to be informed not just from your agency and your shop, but from any shop in the Federal Government.

On the other hand, you have a responsibility, it seems to me an almost absolute responsibility to consult with committee and oversight people on an ongoing basis, and not capriciously when you feel that you have nothing else to do.

Mr. LOVELL. I agree.

Mr. WASHINGTON. So it makes it very difficult for us to carry out our functions when we have to find out what you are doing reading the Washington Post or the Federal Register. Insofar as these proposed changes are concerned, that is exactly how we got whatever information we had prior to last week, when Mr. Reynolds appeared before us.

I might also add that it is somewhat annoying and disturbing, and it borders on disrespect, I think, if I may say so respectfully, when we get testimony of this magnitude and complication, and this revolutionary, only an hour or two before you are to appear before us to testify. Then, you read it in a very rapid tempo, so it is very difficult to digest the nature of what you are talking about. We simply have not had the time to really go into your submissions here.

Based on that, Mr. Chairman, I am going to ask that these two witnesses be requested to appear before us again within a few weeks if we find it necessary, based upon further study of their submissions, to ask additional questions.

Mr. LOVELL. I would be delighted to do that, if you want, Mr. Chairman.

I do apologize. You are quite right, to give you this testimony an hour before is not defensible. It is better than an hour after, I guess. I can't defend that. The least we can do is to make ourselves available at your convenience after you have had the time to study it.

Mr. WASHINGTON. It might be better to submit it after you finish because some of your statements are so euphemistically phrased that I am not certain I can interpret them within the light of what we are talking about.

Anyway, I do appreciate that commitment. It does make me feel good to hear you say that you are committed as a person and as an employee of the Federal Government to the concept that knotty problem of discrimination in employment is something that you are commited to trying to eradicate and bring the affected groups into the mainstream of the economic picture in this country.

Do you agree that the basic theory underlining Executive Order 11246 is that of contract; is that not the basic theory?

Mr. LOVELL. It is dealing only with Federal contractors.

Mr. WASHINGTON. No. The theory, the relationship is a contractual one between the Federal Government and various contractors who come voluntarily to apply?

Mr. LOVELL. That is correct.

Mr. WASHINGTON. In other words, they come voluntarily. They don't have to come to you; is that correct?

Mr. LOVELL. That is correct.

Mr. WASHINGTON. If a company decides that it doesn't want to sell its products to the Government, be it services or goods, it doesn't have to come before you; is that correct?

Mr. LOVELL. That is correct.

Mr. WASHINGTON. Then you would have no jurisdiction over them, would you?

Mr. LOVELL. That is correct.

Mr. WASHINGTON. The OFCCP wouldn't have any jurisdiction over them.

Mr. LOVELL. That is correct.

Mr. HAWKINS. Mr. Washington, would you yield for 1 second. Mrs. Fenwick has to leave, and she wanted to ask a question. Do you have time to yield to her?

Mr. WASHINGTON. Yes, I will yield.

Mrs. FENWICK. I hesitate.

Mr. WASHINGTON. No, you don't. [General laughter.]

Mrs. FENWICK. Thank you, Mr. Washington.

I would like to ask you something. I am very much concerned about equal employment opportunity. If a person cannot get equal opportunity for a job at equal pay with other people, life becomes almost hopeless, and I feel very strongly about that.

I wanted to ask you something about submitting an affirmative action program. I wonder if all those people who are supposed to read those affirmative action programs, would not be more effective if they went around and looked.

I found when I was working in equal employment problems in New Jersey that the only thing to do was to go to the job site, and see who was there, doing what, whether there were minority electricians, plumbers, and the carpenters, or whether everybody was a day laborer.

I don't know how one could do that on a national level, but I am never very interested in this prefiling of a program. I would rather have an audit and a disqualification and a fine, if necessary, when equal justice has not been done. It would seem to me more efficient, in other words, if they knew they might be visited.

Perhaps we should not ask for any plan, but simply tell employers what the law is, and what the rules are, when they sign the contract. Then, let them know that they might be visited, and if they are found out of compliance they are going to be fined, that some of the profits they expected to make are not going to be coming to them.

I don't know whether that is a sensible suggestion, Mr. Chairman, but it seems to me that it is a more practical approach than all this filing of a program which people have to read, and nobody seems to inspect. It seems like an awful lot of work for nothing.

Mr. LOVELL. I do understand what you are saying. I think we are really trying to move in that direction in a sense. It is not quite comparable, I recognize, but it is somewhat in that direction.

Mrs. FENWICK. Are there fines here?

Mr. LOVELL. The Internal Revenue Service does that. They only audit about 2 percent, but everybody knows that if they do not conform to the regulations that they are more apt to be subject to an audit, and more apt to be penalized, and most people are pretty conscientious.

Mrs. FENWICK. How do you mean more apt?

Mr. LOVELL. If an employee of a Federal contractor complains that he is being discriminated against, that employer will be inspected, and that complaint will be investigated.

Mrs. FENWICK. Who will inspect?

Mr. LOVELL. We will, or EEOC.

Mrs. FENWICK. EEOC inspects.

Mr. LOVELL. Either one of us, it depends on the nature of the complaint.

Mrs. FENWICK. A fine is imposed?

Mr. LOVELL. Not necessarily.

Mrs. FENWICK. That is where I think we ought to begin to do something. I think if there is a contract that they have not lived up to, there should be a fine for noncompliance.

Mr. LOVELL. Title VII does cover discrimination, and that applies to everybody, and the penalty for failure to comply with title VII is equitable relief. It is in the law that Congress passed.

Mrs. FENWICK. Equitable relief means that you give the employee what he should have had?

Mr. LOVELL. Yes.

Mrs. FENWICK. I know, I have done those cases, too. I think we have come to a point now where we really ought to have a provision for the possibility of a fine.

Thank you, Mr. Washington, very much. I am sorry I interrupted you.

Mr. HAWKINS. Thank you, Mrs. Fenwick.

Mr. Washington, thank you for yielding.

Mr. WASHINGTON. I agree with Mrs. Fenwick. We need more compliance officers, obviously, but I dare say that we will not get them out of this austerity budget. We need more sanctions and fines. I think that that is the route to go.

We have established, one, there is a contractor relationship and, two, the contractor does not have to do business with the Federal Government, period.

Mr. LOVELL. Right.

Mr. WASHINGTON. Since that is true, don't you think you have overstressed the point of contractor hostility because of rules imposed upon those contractors which are designed to eliminate discrimination?

The example you point to of IRS audit is a perfect example. The IRS doesn't go around asking you if you want to pay taxes. If you don't pay them, you may be audited and you suffer the penalty. It seems to be peculiar to civil rights enforcement that you have to go around and ask who you are giving Government largesse to in the form of a contract whether or not they like the rules and regulations.

The contradiction just stuns me, and the fact that you bring out that example just makes me want to ask you to embellish your point.

Mr. LOVELL. I think that the basic concept that I advanced is that in a free society these concepts of equality in the workplace have to be believed in and enforced by all the people. I compared it with prohibition, for example, which is a better example than my IRS example.

What we are trying to do is not really to reduce our compliance effort, but to expand the voluntary effort. The reduction of the paperwork really is an important aspect of what we are doing, but the basic concept is to improve the performance of Government contractors in this regard, so that we do have a performance that carries us down the direction we want to go in a faster way.

What you are saying is that the only way they are going to do it is by threat of punishment. The chairman and I discussed that a little bit, and we are saying that is not the only way. You do have to hold over a threat of some kind of punishment, but you also have to encourage people to follow the dictates of the national conscience.

I would wager, Mr. Washington, that the vast majority of organizations that are employing women and minorities are not doing it out of fear. They are doing it because they think it is right, and I think you agree with that. The majority of people do not hire minorities and women out of fear.

Mr. WASHINGTON. I don't think that is even relevant. The relevant question and point is, if a contractor voluntarily comes to the Government for a Federal contract, why do you insist on saying that you resent the enforcement laws which enforce contracts, and affirmative action is part of enforcement laws.

Mr. LOVELL. First of all, I think you ought to recognize what we are saying affirmative action is. Affirmative action is not a quota.

Mr. WASHINGTON. I did not say anything about quotas. Let's not go off on that track.

I am trying to nail down my basic premise that it is a contractual relationship, and we agreed. Second, I am citing the IRS as an example of auditing, in which they simply go out and check, and see whether or not there is compliance. It is not hostility. It is their job, as it is presumably your job to make certain that these people who get these contracts comply with the law.

Mr. LOVELL. We are going to do that.

Mr. WASHINGTON. Now you say that the voluntary approach is the approach. Where in history, what empirical evidence, what logic do you have to support the proposition that discrimination at the workshop is going to end through a voluntary process? We don't have that information, and I would like to see it.

Mr. LOVELL. I will say, Mr. Washington, that all of the evidence of everything that has ever been done in the social arena in this country has been done importantly because the people wanted to do it. I really will take issue on that with you, sir. I do not think they do it out of fear of punishment. They do it because they think it is right, they think it is the proper thing, because their institutions accept it as being correct.

I think that it is one of the mistakes that has been made over the last 4 years, the lack of confidence of our institutions to obey the law, to follow decent principles. We are not going to abandon the policeman role, but we are emphasizing, in addition to the policeman role, the importance of voluntary action on the part of citizens and on the part of free institutions.

Mr. WASHINGTON. Notwithstanding your faith in human nature, you simply don't make it easier for people to steal, and you don't make it easier for them to violate regulations which are arrived at for a good purpose, it is just that simple, and I feel that yours do that.

Let's look at these regulations. You insist that the proposed regulations would not limit OFCCP's jurisdiction.

Mr. LOVELL. That is right.

Mr. WASHINGTON. Doesn't that make the point? Won't these changes limit OFCCP's ability to monitor and enforce the regulations?

Mr. LOVELL. No, I don't think so.

Mr. WASHINGTON. As the chairman pointed out, if you have no preaward, if you have no showing of compliance, or intent to comply, and you just willy-nilly give a contract hoping they will voluntarily comply. Then you are short of compliance officers, and you have no way of checking on them.

You have no record of their commitment, so that when you check them, you don't know what you are checking them for. It seems to me to be a catch-22 situation that you are imposing on yourselves.

Mr. LOVELL. I think quite the contrary, Mr. Washington. I think if a company signs a contract with the Federal Government and says that it is going to make a spark plug with two heads for the Government, you don't have to have made a spark plug with two heads before you sign the contract. You just say that after you sign the contract you are going to make spark plugs that way. So the commitment is——

Mr. **Washington**. But you set out the specifications for the Government so they can know whether or not you can make a two-headed spark plug.

Mr. **Lovell**. That is right.

Mr. **Washington**. You set that out or they will not get the contract?

Mr. **Lovell**. I don't know whether that is a complicated procedure, but there is no question in my mind that there is no company in this country that can't abide by these regulations.

Mr. **Washington**. I agree there is no company that cannot.

Mr. **Lovell**. But there may be companies that cannot make two-headed spark plugs.

Mr. **Washington**. Between your analogy and my point, we are going to get confused here.

Mr. **Lovell**. I am a little confused myself. [General laughter.]

Mr. **Washington**. I have problems with the notion that because an agency did not do its job and made use of a yardstick, and that is your criticism of past performance—I have a problem with the idea that just because they didn't do that, they should throw out the whole yardstick.

Mr. **Lovell**. We are not throwing out the whole yardstick. I think we are recognizing that. We are going to try to make responsible judgments in terms of performance, and there are going to be a number of things you are going to look at in that process.

We are not really changing the basic premise of OFCCP, which does rely on affirmative action. That is the thing that distinguishes it from title VII. We are not changing that. We are making changes at the margin to encourage better participation on the part of employers so that our long-term objectives can be reached.

We are making some assumptions just as previous administrations have made assumptions about what will work better, and we are willing to stand up and have you take a look at us. We recognize your oversight responsibility, sir, and contemplate and expect to come back here many times to tell you how we are doing, and to give you information about what we are doing.

I am appalled if we didn't give you information on the changes in the regulations. Ms. Shong said we did, but if we haven't, we certainly will. It is not the intention of the Department of Labor to withhold information of that sort from this committee.

Mr. **Washington**. All this committee got were some letters of regret from Ms. Shong, Mr. Donovan, and a few others saying that you couldn't appear. The next thing we know is that we pick up the Washington Post and see all these finely tuned regulations.

Mr. **Lovell**. I will not take issue with you on that, but if that is so, that is not defensible, and we will not treat you that way in the future.

Mr. **Washington**. Don't you think that it is a bit reckless to propose eliminating 75 percent of the plan in terms of coverage, and at the same time require 5-year approvals?

Mr. **Lovell**. We are not eliminating 75 percent of the plan. We are not eliminating anybody from coverage. We are eliminating about 23 percent of the people from filing an affirmative action program. We are eliminating 77 percent of the written plans, but nobody from the coverage.

Mr. WASHINGTON. In terms of dollars, what would you estimate 77 percent would cover?

Mr. LOVELL. I would not know. If you would like, we can take a look at it and see if we have any figures to give you, but I don't have it at the top of my head.

Ms. SHONG. We don't have the answer to that question, Mr. Washington. However we do estimate that the elimination of this paperwork will save the economy approximately $20 million.

Mr. WASHINGTON. The economy?

Ms. SHONG. It will save the expenditure of $20 million.

Mr. WASHINGTON. I am in no position to challenge your figure. How many employees would escape coverage, potential employees?

Mr. LOVELL. This is an important point—nobody. The coverage is complete.

Mr. WASHINGTON. The coverage is not complete. Let's talk about compliance. Let's talk about reports. Let's talk about preaward.

Mr. LOVELL. We are talking about the necessity of filing an affirmative action program, isn't that right, Ellen?

Ms. SHONG. To develop an affirmative action program.

Mr. LOVELL. To develop it, not to relieve them of the responsibility for taking affirmative action.

Mr. WASHINGTON. Potentially, how many employees would it cover?

Ms. SHONG. Of the employees who are currently included in written affirmative action plans developed by contractors who currently develop them, there would continue to be approximately 77 percent of all those employees still included in written plans because, clearly, more people work for the larger contractors.

We think the law protects people, and not the written document, and the law obligates the contractor not the written plan. There is no change in our jurisdiction over those contractors.

Mr. HAWKINS. Would the gentleman yield at this point?

Mr. WASHINGTON. I will be pleased to yield, Mr. Chairman.

Mr. HAWKINS. Recent testimony before this committee indicates that the change in coverage would exempt those with 100 or fewer employees, and would exempt 80 percent of all new jobs because the employers who are exempted from written affirmative action plans would be hiring that number of employees. Is that reasonably correct?

We are dealing with two different sets of statistics, it seems to me. The statement has been made that by changing the coverage, small companies, those with 100 or fewer employees, who would be generating 80 percent of all new jobs, would be exempt from coverage.

Mr. LOVELL. From preparing affirmative action programs.

Mr. HAWKINS. Pardon me, I did not mean coverage, but from filing affirmative action plans. Is that reasonably correct?

Mr. LOVELL. I just don't know, Mr. Chairman. What I understand you to say, as you look ahead, you think that most of the employment is going to be in the smaller companies; is that what you are saying?

Mr. **Hawkins**. Historically, it has been for at least a couple of decades that these have been the ones who have employed the most. This was taken from the Department of Commerce's study itself. The President has indicated that 13 million new jobs that are going to be created. That is what we are thinking about.

Mr. **Lovell**. I would not take issue with you that many of the jobs that are going to be created over the next decade are going to be in different kinds of industries than they are now. They are not going to be hiring in the automotive industry and in the steel industry, or indeed in the rubber industry, to the degree they have in the past.

You are going to have new industries develop, electronic, and biogenetic, and this kind of thing, and service industries, some of which will at least start off in a smaller way. On the other hand, we are not—I want to reemphasize this—we are not excluding these people from coverage.

Mr. **Hawkins**. We agree on that, that you are not excluding them from coverage. We are simply saying that you are excluding them from filing affirmative action plans. I think the essence of what we are saying is that this is one of the best means of enforcement that you have with the limited resources available.

If you don't have a written affirmative action plan, then you don't have any method of really monitoring and checking on those against whom you are going to be enforcing the law. That, in essence, is the thrust of what we are saying.

Mr. **Lovell**. I understand what you are saying. I think you may have a little more faith in the filing of an affirmative action plan achieving the performance you want than I do. Anybody can file an affirmative action plan, the boiler plate is very well known. They say all the right things, and then whether they do it or not is really the critical question.

Mr. **Hawkins**. American business doesn't rest on faith, it rests on a contract. I recall, and I think you will probably recall with me, that prior to 1972 when we gave to the Equal Employment Opportunity Commission court enforcement, we depended on voluntary compliance, conciliation and arbitration, and it got no place. Fortunately, it was under the Nixon administration that we were able to get court enforcement. You were in the administration at that time, were you not?

Mr. **Lovell**. Yes, I was.

Mr. **Hawkins**. We do recall that the voluntary compliance programs that is now being proposed had failed miserably. We see no reason to resurrect that which has failed.

Mr. **Lovell**. We are not removing in any way the coverage. Anyone who feels that he or she is being discriminated against may file a complaint. That really is the essence of equal employment opportunity, the knowledge on the part of the hiring entity and the knowledge on the part of the individual applicant that discrimination is illegal, and if they believe that they have a case in which they were discriminated against, and that company is a Government contractor, they can file with OFCCP, or if they are not a Government contractor, or even if they are, they can file a title VII complaint. That really is the major enforcement ingredient in equal employment opportunity, the rights of the individuals.

Mr. **Hawkins**. Of course. The rights of individuals cannot always be exercised, Mr. Lovell, because that individual cannot afford to go through several years of very costly litigation with an unfriendly agency. Individuals just simply don't come forward to be guinea pigs for various reasons.

I see no reason why those who do business with the Government, and that is what we are talking about, those who have their fingers in the till, as it were, and as the court said, why shouldn't they be willing, therefore, to exercise a little democracy when their fingers are pulled out of the till because they are the ones who are getting the benefits. I think that is the difference.

We disagree that case by case enforcement is an utter failure. Individuals are not in a position, on the basis of an individual complaint, always to come forward and to exercise their right. If we cannot look at the discriminatory practices of a company through its obeyance of an affirmative action plan for those who at least do business with the Government, and we are not even talking about title VII cases, we are talking about those who are doing business with the Government. It seems to me that this is the best case that we have.

Mr. **Lovell**. I understand what you are saying, and I think you are really basing your concern on the filing of an affirmative action plan. I think that your confidence in that process, perhaps, is greater than mine.

Mr. **Hawkins**. It has worked pretty well in recent years.

Mr. **Lovell**. We really don't know those things that have worked well, and those that don't. I agree with you that in recent years, certainly over the last 10 years, we have made some remarkable progress. I think that it is probably the Gestalt of all we have done as a Nation of which this is a part.

But I would find it very difficult to assign in any equitable fashion the responsibility for this progress to any particular program, to say nothing of any particular part of a program such as the filing of an affirmative action plan.

This Nation has spoken out loud and strong against discrimination, and we have taken a number of steps that demonstrate that we were serious about it, and put into law and contract that concern. The total effort that has been generated by this has produced some fine results.

I think we are moving into a period where we want to continue and even speed up the progress that we have made, and we should not limit ourselves only to the tools we have used in the past. I think we should be willing to use new tools, not abandoning the objectives, but to pursue them, in an imaginative and vigorous way, and see what works better.

I am saying to you, Mr. Chairman, that I think that with the kinds of regulations that we have published here, with other changes that we will make or may make as we hear evidence and hear more discussion on it, the performance in this society toward the objectives that we all cherish will move forward in a responsible fashion.

Mr. **Hawkins**. We will join with you in speeding it up, but in the past 8 months women and minorities have suffered, disproportionately in the layoffs.

Mr. **Lovell**. This has nothing to do with the Government program. Women and minorities suffering layoffs is because of the seniority system, Mr. Chairman. I recognize that problem, but that has nothing to do with the Government program. There is a very tough dilemma in dealing with the seniority system which has been used to protect workers against discrimination of another kind in employment.

Mr. **Hawkins**. We were talking about results. The results in September happened to be that minorities suffered unemployment 2½ times that of their white counterparts. And this is an increase in the gap. The same could be said of women as well. So if we are going to judge results, so far the results have been very discouraging.

Mr. **Lovell**. I do hope that over the next few years that you and I, and others concerned with the differential between white and black unemployment, can put our heads together and see if we can come up with a better understanding of the nature of the problem, and with better solutions than we have come up with up to now.

I must say that I am appalled with everything that has been done in terms of some of the Government programs in this last 10 years. The rate of black youth unemployment has just been insensitive to all the Government efforts we have put on. It seems to me that there are other things. Perhaps we are not addressing the right problem, or perhaps the right groups are not addressing it. I think it is a social tragedy in this country, and I know you share that concern. I hope maybe we can do something about it.

Mr. **Hawkins**. Mr. Washington.

Mr. **Washington**. Thank you, Mr. Chairman.

Let's clear the record on that point. According to the Department's own initial estimates, fixing the threshold at 100 employees and $1 million contracts, it would reduce the number of companies subject to the affirmative action plan requirements from 17,000 to 4,200.

Mr. **Lovell**. That is correct.

Mr. **Washington**. Or 75 percent of all companies presently subject to the affirmative action plan requirement.

Mr. **Lovell**. That is right. It is 250, and not 100 that we are changing to, but that would reduce it from 17,000 contractors to 4,000 contractors, and as I understand it it would reduce the number of people covered to 77 percent; is that right. In other words, there would be a reduction of about one-fourth of the people covered, but a reduction of over three-fourths in the number of companies covered by affirmative action plans.

Mr. **Washington**. According to the congressional committee with the jurisdiction over small business, a large number of the new jobs created each year emanate from the small business sector, those with under 250 employees. If every small business hired one person, it would virtually eliminate unemployment in this country.

In addition, small businesses often supply the training ground for new entrants into the field, as minorities and women are likely to be, thus providing a stepping stone from which they can grow into higher level managerial, technical, or professional positions in larger firms.

Doesn't this make the impact of lessening the affirmative action reporting obligations somewhat grave?

Mr. LOVELL. If you believe that the preparation and submission of an affirmative action plan has a direct relationship to performance, you would be right. We do not think, particularly for small companies, that the development of a plan of this character is of that level of importance. We may be wrong, but we don't think so. There is certainly no evidence that the development of a plan in itself is going to add one iota of difference in how that company performs.

Mr. WASHINGTON. It does have a basis for monitoring?

Mr LOVELL. Again, if we monitored every firm.

Mr. WASHINGTON. Not every firm.

Mr. LOVELL. Let's say you have 17,000 firms that submit affirmative action plans, then if you were to monitor each of them in 3 months, 6 months, and 9 months, I suppose, that sort of police-type action conceivably could, but I don't know that even that would produce any results. Frankly, it would produce a lot of agitation.

Mr. WASHINGTON. You have to assume that you wouldn't monitor all 17,000.

Mr. LOVELL. No; we couldn't, that is right.

Mr. WASHINGTON. You would monitor like the IRS does. That would send out a clear signal that you are at least interested in enforcing it. If you have no plan, and the company has a contract, why should they assume that you are going to monitor them at all? If you do monitor them, you have to go back and ask the original questions that you could have gotten at the beginning.

Let me put this question to you. Did you consider a simplified plan, rather than no plan? Did you give that consideration?

Mr. LOVELL. In all fairness to the regulatory process, Mr. Washington, we have published this. We are still in the process of getting comments, and we have not finalized it. So, obviously, we are still considering all of the comments that have been made. This is not the final regulation.

Mr. WASHINGTON. Did you consider a simpler plan at any time?

Mr. LOVELL. I really cannot say. I was not there, and I cannot tell you the terms of the intellectual process that took place. But we are currently, and I can answer this, we are currently looking at the suggested changes that I have outlined here, and other changes as well.

The regulations as they are finally published, I think in all likelihood will follow a close resemblance to what I have told you, but may well be changed. There may well be changes in this when the final regulations are published, and after we have heard all the public comment and examined the public comments.

Mr. WASHINGTON. Whom did you consult with in coming forward with this proposed plan?

Mr. LOVELL. Neither of us was there.

Let me say, just from my general recollection of how things go in this area, and having served for some years with an organization that did some lobbying itself, the fact that the administration was considering changes in these and other regulations was no secret. As a result a vast number of documents, and arguments, and proposals are submitted to the Department in regard to this and other regulations. Meetings are held, and there is contact with the various civil rights groups, with business organizations, and so forth.

Mr. WASHINGTON. That is the usual procedure.

Mr. LOVELL. That is the usual procedure.

Mr. WASHINGTON. But you don't know if it was done in this case?

Mr. LOVELL. I can't tell you. I would believe that it was, but I would not be able to tell you.

Mr. WASHINGTON. So the record will show that you don't know.

Mr. LOVELL. I do not personally know because I was not there.

Mr. WASHINGTON. Nor does Ms. Shong?

Mr. LOVELL. Neither of us were there at the time. But I would be surprised if that was not so.

Mr. WASHINGTON. But the point is you don't know.

Mr. LOVELL. No.

Mr. WASHINGTON. You did not consult with this committee, which obviously is a reservoir of experience in terms of Mr. Hawkins and others. You did not consult with the committee?

Mr. LOVELL. I just can't say.

Mr. WASHINGTON. Did you consult with people such as Ms. Eleanor Holmes Norton, who may have been a valuable person to supply information?

Mr. LOVELL. Again, I recall, Mr. Washington, that after I left office as Assistant Secretary of Manpower, and a democratic administration came in, they never consulted me. As a matter of fact, when my successor who was a Republican came in, he did not consult me very much either.

Mr. WASHINGTON. I am not concerned about that. I am concerned about what you did. You are coming in with a new plan. You are coming in, and you are going to clean up the mess. You are coming in, and you are going to pave the road toward voluntarism. I just want to know who you talked to to come to that conclusion.

Mr. LOVELL. I will tell you this. Since I have come in, and I can relate that with more accuracy, I have started a series——

Mr. WASHINGTON. Pardon me, Mr. Lovell, I am just trying to nail down that one point about whom you consulted with, and you don't know.

Mr. LOVELL. Let us do this, let us submit for the record whatever information there is on the process, if that would be appropriate. Just because I don't know doesn't mean that it did not take place. Of course it took place, but I don't want to give you false information. I will find out what we did do, and I will give that to you.

[Information submitted by Malcolm Lovell follows:]

RESPONSE TO CONGRESSMAN WASHINGTON, REGARDING OFCCP'S PROPOSED REGULATIONS

The Department of Labor held consultations on the proposed regulations published August 25, 1981, on May 11-12, 1981, with representatives from businesses, unions and other interested groups. We have attached a listing of these invited groups for your information.

INTEREST GROUPS (OFCCP)

Women's Rights Project, American Association of University Women, Mexican American Legal Caucus, NOW LDEF, Working Women, Mexican American National Women's Association, Women's Legal Defense Fund, League of Women Voters Education Fund, Southeast Women's Employment Coalition, Women's Work Force, Coal Employment Project, Women's Equity Action League, American Coalition of Citizens with Disabilities, Leadership Conference on Civil Rights, Mainstream, Inc., League of United Latin American Citizens, Lawyers' Committee for Civil Rights, National Urban League, NAACP, Puerto Rican Legal Defense, American G.I. Forum, National Council of La Raza, Disabled American Veterans, American Legion, National Bar Association, NAACP Legal Defense, Cuban National Planning Council, Center for Law & Social Policy, and Women Employed.

BUSINESS GROUPS (OFCCP)

Association of General Contractors, Associated Builders & Contractors, U.S. Chamber of Commerce, National Federation of Independent Businessmen, Equal Employment Advisory Council, Business Roundtable, Organization Resources Counselors, Inc., National Association of Home Builders, National Association of Manufacturers, and Government Research Corp.

UNIONS (OFCCP)

Laborers International Union, United Steelworkers, Building and Construction Trades Department, AFL-CIO, International Union of Electrical, Radio and Machine Workers, AFL-CIO, IUD, Coalition of Labor Union Women, UAW, and International Brotherhood of Teamsters.

Mr. WASHINGTON. In this instance, particularly?

Mr. LOVELL. Yes.

Mr. WASHINGTON. What measures will you use to evaluate the good faith contractors' effort; and what sanctions will you employ, particularly in those areas where no affirmative action plans are required?

Mr. LOVELL. Ms. Shong reminds me that this whole subject is up for public comment, and I think we are somewhat constrained from discussing it at this point. Once that period is over, we, of course, will be glad to come back and do that.

Mr. WASHINGTON. You mean that this committee can't get some information about what ideas you have for enforcing this mechanism?

Mr. LOVELL. I am told not.

Mr. WASHINGTON. It would not have to be a fine, but just give us some inkling as to what you propose to do to enforce it.

Mr. LOVELL. Let me do this, let me check with our attorneys as to whether we do have any constraints of that kind. If we don't, we will reply in writing to you, if that is all right.

Mr. WASHINGTON. Certainly.

[Information submitted by Malcolm Lovell follows:]

MONITORING SMALL CONTRACTORS AFFIRMATIVE ACTION OBLIGATIONS

As I mentioned at the hearing, this subject was a subject of public comment, and no decisions have been made yet Those decisions will be made following the ongoing review and analysis of comments received on our August 25, 1981, Notice of Proposed Rulemaking.

The Department has specifically raised this precise question in its August 25, 1981, Notice of Proposed Rulemaking: "How should small contractors be monitored for their affirmative action obligations if the thresholds are raised."

The comment period relative to this issue closed on Monday, October 26, 1981, at which time the Department received over 1,400 written comments. The Department is now in the process of reviewing, tabulating and coding the comments. No decision as to the issue raised has yet been suggested or finalized.

Mr. WASHINGTON. Do you feel that the threat of debarment and the requirement that contractors remedy existing discrimination before being deemed to be in compliance has proved to be an effective means of achieving the congressional intent of the Department's goal?

Mr. **Lovell**. I think the threat of debarment is a serious threat, and when it has been used, it has been taken very seriously.

Mr. **Washington**. Do you suggest any unique or different ways of using that sanction under your voluntary proposal?

Mr. **Lovell**. I want to make this clear. Our program is not entirely voluntary. We are maintaining the basic integrity of it.

Mr. **Washington**. Voluntary in the sense that you have used the word.

Mr. **Lovell**. What we are doing is, in addition to regulatory responsibility, to encourage a climate of voluntarism that can expand many times the effort on the part of the contractors to help us achieve our purpose. We are not making the whole thing a voluntary program. There is still a contractual requirement. We still have our affirmative action requirements in there.

Mr. **Washington**. Is that the end of your answer?

Mr. **Lovell**. Yes.

Mr. **Washington**. Aside from enforcement, without the summaries, without the proposals, without the plans, how will your office, Ms. Shong, know whether contractors, whom it does not review, have affirmative action programs?

Ms. **Shong**. Excuse me, Mr. Washington, and Mr. Chairman, if I might back up for just a moment, because I think this is a point that is commonly misunderstood.

Neither the Executive order nor the regulations, published under the Executive order currently and proposed require anyone to file an affirmative action program; they only require certain contractors, of a certain level of employee work force and size contract, to develop the plan. We never see that plan until we notify the contractor that we have scheduled a compliance review. So we don't know if any contractor has a plan, unless we have asked for the plan in the course of doing a desk audit and an onsite compliance review.

We use, for purposes of scheduling those reviews, among other things, EEO-1 information. The EEO-1 report is filed annually by employers of at least 100 employees. That information, especially over time, over 2-, 3-, 4-, 5-year periods, where we can look at how the employer's work force, how the contractor's work force has changed, how it has grown or not grown, if minorities and women have participated or not participate, is a piece of the information we use in notifying a contractor that there is going to be a compliance review. Only at that time does the contractor submit the written affirmative action plan, if in fact he has developed one.

So we would continue to use that process for all contractors, whether or not they are the ones that have to develop a written affirmative action plan. The change in the threshold for the purposes of developing that document, that instrument, does not limit our jurisdiction to do a compliance review or a complaint investigation. We might nonetheless conclude that a compliance review is in order for a contractor who has fewer than 250 employees and $1 million in business.

We might conclude that a compliance review is in order on the basis of that EEO-1 information, the existence of outstanding complaints, the expressions of concern by special interest groups in the community, and a number of other pieces of information that we currently use in scheduling reviews.

We will be looking at that contractor's existing work force, and working through the availability analysis, whatever methodology is finally adopted, at the time we do the review, which is exactly what we do now. Frequently contractors don't have it in advance of our coming, so we have not lost anything in terms of time in doing that compliance review.

Mr. WASHINGTON. Are you, therefore, assuring us that the administration will not propose changes or reductions in the EEO-1 through 6 reports?

Ms. SHONG. I am sorry, I did not hear your question.

Mr. WASHINGTON. Are you assuring us that there will be no changes in the EEO-1 through 6 reports?

Ms. SHONG. I don't have exclusive responsibility for that, Mr. Washington.

Mr. WASHINGTON. What is your feeling on it?

Ms. SHONG. We have proposed a change in the regulation that a contractor would have to file the EEO-1 report if he has 100 employees, as opposed to the current requirement of 50. That 100-employee trigger, if you will, comports with the existing EEOC requirement.

Mr. LOVELL. It makes it consistent with the EEOC.

Ms. SHONG. That is right.

Mr. WASHINGTON. I will yield for the time, Mr. Chairman.

Mr. HAWKINS. Mr. Weiss.

Mr. WEISS. Thank you, Mr. Chairman, but I have no questions.

Mr. HAWKINS. May I ask you, Mr. Lovell, the administration's failure to solicit comments pertaining to the awarding of back pay under the Executive order, does this by any means indicate that there is a reluctance to submit this, or that there is a position on it at this time?

Mr. LOVELL. I think we have asked for comments, haven't we?

Ms. SHONG. That is true.

Mr. LOVELL. We have asked for comments.

Mr. HAWKINS. You have asked for comment, yes, but does that solicitation of comments on the awarding of back pay indicate an open mind, a disposition to be for or against it?

Mr. LOVELL. I think that it indicates an open mind.

Mr. HAWKINS. We would certainly hope so.

Any further questions, Mr. Washington?

Mr. WASHINGTON. No, Mr. Chairman, thank you.

Mr. HAWKINS. I suppose that concludes the testimony this morning, Mr. Lovell, and Ms. Shong. As you indicated, you have made yourselves available to the committee for which we are deeply appreciative. May I indicate with respect to the failure of certain witnesses to appear or not to appear, that we have had a disappointing experience which I am confident will now not be so.

I was a little reluctant this morning in introducing you, Mr. Lovell, as to whether or not you had been confirmed. My understanding is that you have been confirmed as Under Secretary of Labor for which we are certainly pleased. I know that despite differences, we will have the usual cooperation that we have always enjoyed with you in your position. We certainly look forward to that cooperation.

Personally, I am very pleased that we will be able to explore some of the changes that are being suggested. We, obviously, are very reluctant to look with optimism on them, but certainly we hope that we can achieve the results that you so optimistically expect.

If along the way we sometimes are a little critical, certainly I think you will understand that we have been disappointed before, and we hope that this disappointment will not continue. We certainly appreciate your appearance before the committee.

Mr. WEISS. Mr. Chairman.

Mr. HAWKINS. Mr. Weiss.

Mr. WEISS. I wonder if I could address just one area. I understand that there was a general comment before I arrived, and I apologize for my late arrival, on staffing that you may have available for enforcing the areas of concern that we are talking about.

Can you give us a more specific idea as to what your staffing situation is; what kind of a cutback is there from current compliance staffing levels over last year's?

Mr. LOVELL. The President has asked almost all Federal departments, I think, with the exception of the Sinai Peace Force and the FBI, and the Defense Department, perhaps, to make a 12 percent cut. We are now taking a look at what that would mean for us. He has asked it to be across the board.

I presume we will just move in that area, but we are still in the process of taking a look at what it means to the Department of Labor, and we are not yet in a position to have the information from the various units so that the Secretary can make the judgments as to where these cuts will in fact take place.

Mr. WEISS. That is the new proposal, is that right?

Mr. LOVELL. Yes, that is the new one that is coming before the Congress.

Mr. WEISS. My question really is, What kind of a cutback has there been already implemented in the Reagan administration?

Mr. LOVELL. In OFCCP?

Mr. WEISS. Yes.

Ms. SHONG. I don't recall the precise figures, Mr. Weiss.

Mr. WEISS. Do you have a percentage?

Ms. SHONG. We can get you that. I can tell you this, first of all it is only a proposal at this point or a request.

Mr. WEISS. What is only a request?

Ms. SHONG. The allocation of the "by line item," if you will, on the budget. What we have requested is that whatever reductions will be experienced primarily, and what we have taken to date, in ADP moneys and contract support rather than in staff people, or staff hours.

Mr. LOVELL. I think the question was, have we made any reductions in the last 6 months, before this?

Ms. SHONG. No.

Mr. LOVELL. She does not think so.

Mr. WEISS. Compared to January 20, 1981, what is your current level of staffing, do you know?

Ms. SHONG. I will have to get that information for you.

Mr. WEISS. Would you provide us with that information as well as your projections for the next fiscal year?

Mr. LOVELL. As soon as we have it, we will do that.

[Information submitted by Malcolm Lovell follows:]

CURRENT STAFFING OF OFCCP

OFCCP staffing information is most readily available on a fiscal-quarter basis. As of December 31, 1980, OFCCP employed 1,283 persons on a full time permanent basis and 62 persons in "other" categories for a total of 1,345 employees.

As of September 30, 1981, OFCCP employed 1,183 persons on a full time permanent basis and 24 persons in "other" categories for a total of 1,207 persons. This represents a reduction of 138 persons (10.2 percent) due to attrition only. To date, no OFCCP employees have been separated due to reduction-in-force or due to other budget limitations.

Although staffing levels will be reduced as a result of budget reductions in fiscal year 1982, the Department of Labor has not yet finalized its projections regarding the extent of those reductions. We will, of course, advise you once that information is available.

Mr. WEISS. Thank you very much.

Thank you, Mr. Chairman.

Mr. HAWKINS. Thank you, Mr. Lovell and Ms. Shong.

The next witnesses consist of the Honorable J. Clay Smith, Jr., Acting Chairman of the Equal Employment Opportunity Commission, who is accompanied by Ms. Constance Dupre, Acting Deputy General Counsel; Ms. Debra Millenson, Acting Director of the Office of Systemic Programs; and Issie Jenkins, Acting Executive Director.

We welcome all of the witnesses. We look forward to your testimony.

Mr. Smith, I assume you will be the anchorperson, as we are sometimes cautioned to say.

STATEMENT OF J. CLAY SMITH, JR., ACTING CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ACCOMPANIED BY DOUGLAS BIELAN, ACTING DIRECTOR, OFFICE OF INTERAGENCY COORDINATION; CONSTANCE DUPRE, ACTING DEPUTY GENERAL COUNSEL; DEBRA MILLENSON, ACTING DIRECTOR, OFFICE OF SYSTEMIC PROGRAMS; AND ISSIE JENKINS, ACTING EXECUTIVE DIRECTOR

Mr. SMITH. Good morning. I am pleased to appear before the Subcommittee on Employment Opportunities today to point out some of the Equal Employment Opportunity Commission's accomplishments during my tenure as Acting Chairman, to discuss with you some of the activities and plans of the Commission's Office of Interagency Coordination and Systemic Programs, and to share with you my thoughts on the important issue of affirmative action and equal employment.

Before beginning my remarks, I feel it is appropriate to note that I can speak only for the present and with regard to the activities of the EEOC to date. Hearings on the nomination of Chairman-designate William Bell and General Counsel-designate Michael Connally were scheduled before the Senate Committee on Labor and Human Resources the day before my scheduled testimony. Once the permanent Chairman and General Counsel assume their position, they, of course, will speak to the future policy of the Reagan administration in this area.

My testimony will cover the following subjects: First, class discrimination and class relief; second, affirmative action as a remedy interpreted by the judiciary; third, affirmative action as part of voluntary compliance; fourth, the EEOC's Office of Interagency Coordination; and, fifth, EEOC's Office of Systemic Programs.

Four of the Commission's staff are sitting with me this morning. They are: Issie Jenkins, Acting Executive Director; Constance Dupre, Acting General Counsel; Debra Millenson, Acting Director of the Office of Systemic Programs and Douglas Bielan, Acting Director of the Office of Interagency Coordination.

I have attached several appendices to my statement today. I particularly want to point your attention to one of them, appendix A, at this time, since it contains a fuller statement of my views on equal employment opportunity and affirmative action.

Now I would like to go into the history of title VII, and the concepts of remedial and voluntary affirmative action.

THE HISTORY OF TITLE VII SUPPORTS THE CONCEPTS OF REMEDIAL AND VOLUNTARY AFFIRMATIVE ACTION

The House Committee on Education and Labor, in its report accompanying the 1972 amendments to title VII of the Civil Rights Act of 1964, took note that when the Committee had considered title VII 8 years earlier, "employment discrimination tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to ill will on the part of some identifiable individuals or organizations. * * * Today, * * * experts familiar with the subject describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs." The Committee's Report specifically noted with approval the U.S. Supreme Court's decision in *Griggs* v. *Duke Power Company.* In *Griggs,* the Court held, in voiding the use of unvalidated general intelligence tests and high school diplomas as selection devices by the Duke Power Co., that practices, procedures, or tests, "neutral in terms of intent," cannot be used where they operate to freeze the status quo of prior discriminatory employment practices, unless they are justified on grounds of business necessity.

The committee's report not only reflected the committee's legislative findings, it also reflected EEOC's and several district courts and circuit courts of appeals' experiences. It is interesting to note in this regard that the first reported case arising under title VII, *Hall* v. *Werthan Bag,* a 1966 case, found that "racial discrimination is by definition class discrimination" since the existence of the discriminatory policy threatens the entire class.

Because it found entrenched patterns and practices of employment discrimination, Congress in drafting title VII took care to arm the courts with full equitable powers in section 706f(g) of title VII. This section permits courts, who find that an employer has engaged in unlawful employment practice, to enjoin the employer from engaging in such unlawful employment practice and to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * * or any other equitable relief as the court deems appropriate."

AFFIRMATIVE ACTION: STATUTORY REMEDY AS INTERPRETED BY THE JUDICIARY

Now I would like to go to affirmative action as statutory remedy as interpreted by the judiciary.

The wording of section 706(g), referred to above, caused considerable concern because some thought it might be construed to require the use of quotas or exact parity in determining an employer's compliance with title VII. The sponsors of the bill repeatedly assured their colleagues that this was neither the intent nor the effect of this section. However, as Congress recognized in enacting the 1972 amendments to title VII, numerical, race-conscious[1] relief is available under title VII to remedy employment discrimination. All nine of the Federal courts of appeals that have considered the legality of this kind of relief have found it lawful when necessary to remedy discrimination, and the U.S. Supreme Court has declined to review these rulings.

Thus, the courts have recognized that affirmative action goals and timetables may, in some respects, equitably benefit members of protected groups who were not specifically victimized by an employer's unlawful acts, just as they may, in certain circumstances, interfere with the expectation of incumbent workers who did not specifically benefit from the employer's unlawful acts.

The decisive factor in considering the appropriateness of the affirmative action under title VII has been the recognition by the courts of the overriding public policy enunciated by Congress in adopting the Civil Rights Act of 1964. That policy—that the pervasive effects of a societal pattern of discrimination in employment must be eliminated before opportunities can truly be equal—has been judicially determined to outweigh the expectations of incumbent nonminority males once unlawful discrimination has been shown.

Affirmative action is not the exclusive relief which EEOC seeks in attempting to remedy discrimination. In many instances the focus of the Commission's remedial effort is upon the individual victim of specific unlawful discriminatory acts. Back pay, seniority adjustments, and retroactive promotions are also forms of relief, and must be given appropriate weight in the title VII remedial scheme. However, the history of enforcement has demonstrated that the effects of discrimination cannot always be fully eliminated by these remedies, and that, as a practical matter, not all victims of an employer's discriminatory acts can be individually identified. The Supreme Court recognized in the *General Telephone* case that EEOC is charged in its pattern and practice litigation with a responsibility which goes beyond seeking relief for specific individual class members. The Commission must serve, as well, the public interest in the complete elimination of discriminatory employment practices.

The decisional law is clear; affirmative action is a legal and appropriate remedy for violations of title VII.

It is important to note that the factual circumstances—that is, the continuing discrimination and pervasive employment disadvantages suffered by minorities and women—which underlie existing public policy and EEO law has not been so markedly changed that title VII and its affirmative relief are no longer critical to insuring equal opportunities.

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[1] There is no basis on which to distinguish between the protected classes in this regard. Sex-conscious, national origin—conscious, etc. relief is equally valid.

AFFIRMATIVE ACTION AS PART OF VOLUNTARY COMPLIANCE

Now I would like to address affirmative action as part of voluntary compliance.

Voluntary compliance by an employer within the dictates of title VII is central to the efficacy of the statute. The Supreme Court, in *Alexander* v. *Gardner-Denver,* emphasized the importance to title VII of voluntary resolutions of disputes.

In order to render meaningful EEOC's efforts to obtain such voluntary compliance, the agency and covered employers must have available to them all the means of eliminating discrimination which could be judicially invoked. Thus, the courts have held that once an employer determines that a particular race-conscious action is appropriate to remedy either apparent employment discrimination in its workplace or the present effects of past discrimination, the employer is free to adopt voluntarily a reasonable affirmative action program.

The Supreme Court, in *United Steelworkers* v. *Weber,* recognized the importance of employer input in remedying title VII violations. The court pointed out:

> Title VII could not have been enacted into law without substantial support from legislators in both houses who traditionally resisted Federal regulation of private business. Those legislators demanded as a price for their support that management prerogatives and union freedoms . . . be left undisturbed to the greatest extent possible.

In exercising these prerogatives, employers prefer voluntary remedial action to Government enforcement of title VII. As a company witness testified during the *Weber* trial:

> We realized that if we did not do something on our own, then the Government was going to do it to us * * *, and whatever their remedy is * * * it's one heck of a lot worse than something we can work out ourselves.

The concept that a remedy under title VII need not always be limited to the identifiable victims of proven discrimination is particularly applicable in the context of voluntary compliance. To force an employer to admit unlawful conduct as a precondition to remedy would eliminate a significant incentive for voluntary compliance and settlement without litigation. Such an admission might well be prejudicial to the employer in subsequent proceedings brought by persons outside the scope of settlement, and might subject the employer to liability beyond that which he would have incurred in litigation. A major reason why employers seek to resolve title VII disputes voluntarily is the expense, both in actual costs and in disruption to the workforce, of litigation. The monetary incentive for voluntary settlement would be materially lessened were individual identification of victims required. The mechanisms for identifying the individual victims of discrimination are cumbersome at best. In the absence of extensive and costly discovery engaged in at trial, any such determination would be to some degree speculative. Even if some mechanism existed for identifying victims in the course of voluntary compliance efforts, the cost and delay of that process would be prohibitive. For example, in the nationwide steel consent degree case, *United States* v. *Allegheny-Ludlum Industries, Incorporated,* it was conservatively estimated that individual determinations by a special master for the 60,000 claimants, with each person's case taking one hour to resolve, would consume 28 years of trial time. In *U.S. and EEOC* v. *Lee Way Motor Freight, Incorporated,* a case in which specific victims were identified and their claims individually adjudicated, the trial on the pattern and practice of liability was completed and an opinion rendered 18 months after suit was filed. The hearings on the appropriate individual remedies consumed the next 4 years.

The expense and workforce disruption of proceedings such as those in *Lee Way* if required as a precondition to voluntary resolution, could render that type of resolution unfeasible. An employer who might otherwise seek to avoid the costs of litigation through voluntary compliance with title VII might find that such compliance entails the same expenditures and disruption without the potential for exculpation which he might obtain through litigation.

Mr. HAWKINS. Mr. Smith, if I may interrupt. There is a vote pending in the House on Senate Bill 1181, the Armed Forces Pay Act, and I am sure the members of the committee would want to vote on it. I would like to take this opportunity to recess for 5 minutes.

[Recess.]

Mr. HAWKINS. The committee will resume its sitting.

Mr. Smith, we apologize, and will you continue?

Mr. SMITH. Yes, Mr. Chairman.

Against this backdrop, let me explain EEOC's Affirmative Action Guidelines. The Guidelines have three significant features.

First, the Guidelines encourage voluntary action. Thus, the guidelines provide a climate in which employers can undertake voluntary affirmative action, that is, employment decisions appropriate to enable past victims of discrimination, primarily minorities and women, to overcome the effects of past or present employment policies which operate as barriers to equal opportunity. This is very important because Congress intent in title VII, as I noted earlier, was for employers to improve voluntarily the employment opportunities for past or present victims of discrimination.

Second, the guidelines recognize that discrimination against all individuals because of race, color, sex, religion, or national origin, is illegal under Title VII. The guidelines make clear that charges of discrimination filed by non-minority male will be processed by the Commission.

Third, the guidelines are EEOC's way of instructing employers as to how to harmonize two seemingly conflicting themes—affirmative action and the duty not to discriminate.

If employers adhere to the three Rs of the guidelines, they can institute affirmative action and can be immunized from liability for discrimination. The three R's that are set out in the guidelines are as follows: (1) Reasonable self-analysis; (2) Reasonable basis for concluding a particular employment action is appropriate; and (3) Reasonable action.

The first "R" of the Affirmative Action Guidelines contemplates that the employer will conduct a reasonable self-analysis. A reasonable self-analysis is one in which the employer determines whether any of his employment practices:

> Exclude, disadvantage, * * * or result in adverse impact or disparate treatment of previously excluded or restricted groups, or leave uncorrected the effect of prior discrimination and, if so, to attempt to determine why.

A reasonable self-analysis is much like a blueprint. Both contain important specifications and the user knows the underlying reason for each figure. A self-analysis should cover all employment practices and their effect on protected groups.

The second "R" is that there be a reasonable basis for the employer's affirmative action. The Guidelines contemplate that employers evaluate their work force or employment decisions to determine whether they have situations which could be in violation of title VII. No employer has to state publicly or privately to the EEOC that he has violated title VII.

Reasonable action is the third "R" contemplated by the guidelines. An affirmative action plan must be reasonable in relation to the problem disclosed by self-analysis. In considering the reasonableness of a particular affirmative action plan, the EEOC will generally apply the following standards:

The plan should be tailored to remedy the problem identified in the self-analysis;

The plan should be designed to insure that employment systems operate fairly in the future while avoiding unnecessary restrictions on opportunities for the work force as a whole;

The plan, if it has race or sex-conscious provisions, can be maintained only as is necessary to remedy the problem; and

If the plan includes goals and time-tables, they must be reasonably related to considerations such as the effects of past discrimination, the need for prompt elimination of adverse impact or disparate treatment, the availability of qualified applicants, and the number of employment opportunities expected to be available.

It should be emphasized that only affirmative action plans adopted in "good faith, in conformity with, and in reliance upon" the Guidelines can receive the full protection of the Guidelines, including the immunity defense provided by section 713(b)(1) of title VII.[2]

The Guidelines also state that the EEOC will give comity to affirmative action plans developed pursuant to Executive Order No. 11246. This is important, because many employers are government contractors and therefore subject to Executive Order No. 11246 as well as title VII and in enforcing the Executive order, the Office of Federal Contract Compliance Programs may have already required an employer to develop an affirmative action plan. The Guidelines state that an employer, who has had a plan approved in order to come into compliance with the Executive order, may rely on that plan to demonstrate compliance with EEOC's guidelines.

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[2] This section reads as follows: "(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or commission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, . . ."

Hence, the Government's approach in this area is coordinated and avoids potential conflicts between the two primary Federal agencies enforcing employment anti-discrimination laws.

I have attached a copy of the guidelines to my presentation this morning, and ask that they be made part of the record. They are at Appendix B.

EEOC'S OFFICE OF INTERAGENCY COORDINATION

I would like to discuss the EEOC's Office of Interagency Coordination.

The Commission received interagency coordination responsibility in Reorganization Plan No. 1 of 1978 and in Executive Order 12067. The affirmative action guidelines, which I have just discussed, were among the first actions coordinated by EEOC pursuant to this responsibility. The Commission office responsible for coordinating the guidelines, and all other external Federal EEO issuance, is EEOC's Office of Interagency Coordination.

There has been no change in this office's role in the new administration. For the record, I have attached the exchanges of correspondence between OMB and myself that make this clear. They appear as appendix D.

This office's second annual report, covering fiscal years 1979 through 1980, is presently being printed at the Government Printing Office. I would be happy to provide copies of it and the office's first annual report to all the interested members of the subcommittee.

One of the matters presently being coordinated by this office is the Federal Contract Compliance Program's Notice of Proposed Rulemaking on Affirmative Action Regulations for Government Contractors under Executive Order 11246.

The Commission applauds OFCCP's effort to reduce burdens on smaller employers, to diminish the paperwork requirements of the contract compliance program, to introduce regulatory simplifications, and to reconcile the contract compliance requirements to the guidelines issued by the Commission under title VII.

The proposed regulations raise several issues that relate to the concerns expressed by the subcommittee today. One of these issues is OFCCP's proposal to adopt higher threshold requirements which, we believe, would limit coverage of Executive Order 11246. Another issue is OFCCP's proposal to authorize extended duration affirmative action plans without what we believe are proper safeguards.

Of course, I cannot predict for you this morning how the further negotiations required by Executive Order 12067 will affect these issues. I also cannot predict for you this morning how the Commission will act on these proposed regulations once a Commission quorum is formed.

EEOC'S OFFICE OF SYSTEMIC PROGRAMS

I now would like to go into a discussion of the EEOC's Office of Systemic Programs.

The Commission's Office of Systemic Programs has made significant progress during the latter half of fiscal year 1981. This progress, we believe, will continue during fiscal year 1982.

The criteria by the office for targeting respondents were adopted by the Commission on July 20, 1978. The criteria, which are published in the Commission's Compliance Manual, serve not only to guide systemic targeting by EEOC, but also to make respondents aware of the program's standards and focus.

I will not read these standards since they appear in my prepared statement and thus will appear in the record.

I will move now to page 14 of my prepared testimony.

The implementation of these criteria has, in our view, led to a more efficient use of the Commission's systemic resources, since these factors are designed to focus on the worst discriminators first. They have led to the issuance of 130 systemic charges against employers to date. Our projections show that they will lead to an additional 45 systemic charges during fiscal year 1982.

During the last quarter of fiscal year 1981, new computerized models for targeting systemic respondents were completed and distributed to the field. These models will make it easier for EEOC's field offices to implement the Commission's systemic targeting program. While the models presently focus only on employers, they will be expanded soon to include unions and apprenticeship programs.

The targeting models permit comparisons of employers who utilize similar job skills in various industries, as well as comparisons of the employment practices within those given industries. Employers are reviewed with respect to their overall employment profile, as well as by job and by specific protected class. Some of the other factors taken into consideration are locations within an SMSA, size of the employer's work force, growth trends, and commuting patterns. Using a computer model and other targeting tools, the Office of Systemic Programs generated 23 new Commissioner charges during the third and fouth quarters of fiscal year 1981.

Charges in the system are progressing on schedule. During the fourth quarter of fiscal year 1981, the Commission issued its first seven systemic charge decisions under this program. These are now being conciliated. If these efforts fail, these charges will be referred for litigation. We expect to consider another 45 to 50 such decisions during fiscal year 1982.

Recognizing the benefits to Government, industry, and the victims of discrimination from the voluntary resolution of title VII disputes, we are making active efforts to settle these charges even prior to decision. However, even allowing for a substantial number of settlements, we anticipate that approximately 15 systemic lawsuits will be filed next year by our field offices, resources permitting.

CONCLUSION

While I realize that these hearings center on the subject of affirmative action, I would like to assure you that the EEOC is alive and well.

There has been some concern about equal employment opportunity, but the public is not often able to assess the positive actions of their Government in this vital area. I wish to report to you that the Commission's title VII backlog, which stood at almost 70,000 charges as of January 1979, is now below 24,000 charges.

During the first three quarters of fiscal year 1981, charge processing figures show a continued climb in the area of production and benefits. During this period, the Commission took in for processing 40,293 charges. Our field offices resolved 54,482 charges, or 35 percent more than we took in. This represents a one-third increase in production over comparable figures of last year, fiscal year 1980. In the title VII area, the Commission received 31,751 charges and resolved 45,456, or almost 45 percent more than we took in.

More important, Commission processes continue to provide substantial relief. Despite the extraordinary number of new charges, the title VII rapid charge settlement rate is holding at 43 percent. The settlement rate for age discrimination charges has risen to 25 percent, and equal pay settlements have gone up to 27 percent.

During the first 9 months of 1981, in many of which I served as acting chairman, approximately $60 million in relief was obtained for 36,682 people. These figures exceed benefit attained for all fiscal year 1980.

On the litigation side, we recently settled an employment discrimination suit against the Nation's largest retail employer, Sears, Roebuck, & Co. The terms of the agreement were directed at insuring that Sears would implement procedures to monitor its own hiring practices in ways that should assure compliance with the law. We believed then, and we believe now, that this agreement will enhance minority opportunities at Sears, and we hope to observe signs that will justify that belief in the near future.

On September 11, 1981, EEOC reached an agreement with Nabisco. In the agreement, Nabisco agreed to establish a settlement fund for the benefit of a nationwide class of female bakery employees. This settlement fund, upon final approval by the U.S. district court in Pittsburgh, Pa., will exceed $5 million.

In addition to the foregoing, we obtained $4,990,000 through litigation for alleged victims of discrimination during the first 6 months of fiscal year 1981, which was a substantial increase over the $2 million-plus received over a comparable period of time during fiscal year 1980.

I would like to thank the committee for inviting me to testify. My statement and the appendixes are respectfully submitted for the record.

[The prepared statement of Clay Smith and appendixes follow:]

PREPARED STATEMENT OF J. CLAY SMITH, JR., ACTING CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

I. INTRODUCTION:

Good morning. I am pleased to appear before the Subcommittee on Employment Opportunities today to point out some of the EEOC's accomplishments during my tenure as Acting Chairman, to discuss with you some of the activities and plans of the Commission's Office of Interagency Coordination and Office of Systemic Programs, and to share with you my thoughts on the important issue of affirmative action and equal employment opportunity on which you sought comments in your letter of invitation. Before beginning my remarks, however, I feel it is appropriate to note that I can speak only for the present and with regard to the activities of the EEOC to date. Hearings on the nominations of Chairman-designate William Bell and General Counsel-designate Michael Connally were scheduled before the Senate Committee on Labor and Human Resources only the day before my scheduled testimony. Once the permanent Chairman and General Counsel assume their positions, they, of course, will speak to the future policy of the Reagan administration.

My testimony will cover the following subjects: Class discrimination and class relief, affirmative action as a remedy interpreted by the judiciary, affirmative action as part of voluntary compliance, the EEOC's Office of Interagency Coordination, and EEOC's Office of Systemic Programs.

Three of the Commission's staff are sitting with me this morning. They are: Issie Jenkins, Acting Executive Director, Constance Dupre, Acting General Counsel, and Debra Millenson, Acting Director, Office of Systemic Programs.

I have attached several appendices to my statement today. I particularly want to point your attention to one of them, Appendix A, at this time, since it contains a fuller statement of my views on equal employment opportunity and affirmative action.

II. The History of Title VII Supports the Concepts of Remedial and Voluntary Affirmative Action:

The House Committee on Education and Labor, in its Report accompanying the 1972 amendments to Title VII of the Civil Rights Act of 1964, took note that when the Committee had considered Title VII eight years earlier "employment discrimination tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to ill will on the part of some identifiable individual or organization.... [T]oday... [e]xperts familiar with the subject generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs." The Committee's Report specifically noted with approval the United States Supreme Court's decision in Griggs v. Duke Power Co., 401 U.S 424 (1971). In Griggs, the Court held, in voiding the use of unvalidated general intelligence tests and high school diplomas as selection devices by the Duke

Power Co., that practices, procedures, or tests, "neutral in terms of intent", cannot be used where they operate to freeze the status quo of prior discriminatory employment practices, unless they are justified on grounds of business necessity.

The Committee's Report not only reflected the Committee's legislative findings, it also reflected EEOC's and of several District Courts and Circuit Courts of Appeal experience. It is interesting to note in this regard that the first reported case arising under Title VII, Hall v. Werthan Bag, 251 F. Supp. 184 (M.D. Tenn. 1966), found that "racial discrimination is by definition class discrimination" since the existence of the discriminatory policy threatens the entire class.

Because it found entrenched patterns and practices of employment discrimination, Congress, in drafting Title VII took care to arm the courts with full equitable powers in Section 706(g) of Title VII. This section permits courts, who find that an employer has engaged in an unlawful employment practice, to enjoin the employer from engaging in such unlawful employment practice, and

> "order such affirmative action as may be appropriate which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... or any other equitable relief as the court deems appropriate."

III. Affirmative Action: Statutory Remedy as Interpretated by the Judiciary

The wording of Section 706(g), referred to above, caused considerable concern because some thought it might be construed to require the use of quotas or exact parity in determining an employer's compliance with Title VII. The sponsors of the bill repeatedly assured their colleagues that this was neither the intent nor the effect of this section. However, as Congress recognized in enacting the 1972 amendments to Title VII, numerical, race-conscious[1] relief is available under Title VII to remedy employment discrimination. All nine of the Federal Courts of Appeals that have considered the legality of this kind of relief have found it lawful when necessary to remedy discrimination, and the United States Supreme Court has declined to review these rulings.

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[1] There is no basis on which to distinguish between the protected classes in this regard. Sex-conscious, national origin conscious, etc. relief is equally valid.

Thus, the courts have recognized that affirmative action goals and timetables may, in some respects, equitably benefit members of protected groups who were not specifically victimized by an employer's unlawful acts; just as they may, in certain circumstances, interfere with the expectations of incumbent workers who did not specifically benefit from the employer's unlawful acts. The decisive factor in considering the appropriateness of affirmative action under Title VII has been the recognition by the courts of the overriding public policy enunciated by Congress in adopting the Civil Rights Act of 1964. That policy -- that the pervasive effects of a societal pattern of discrimination in employment must be eliminated before opportunities can truly be equal -- has been judicially determined to outweigh the expectations of incumbent non-minority males once unlawful discrimination has been shown.

Affirmative action is not the exclusive relief which EEOC seeks in attempting to remedy discrimination. In many instances the focus of the Commission's remedial effort is upon the individual victim of specific unlawful discriminatory acts. Back pay, seniority adjustments and retroactive promotions are also valuable forms of relief, and must be given appropriate weight in the Title VII remedial scheme. However, the history of enforcement has demonstrated that the effects of discrimination cannot always be fully eliminated by these remedies; and that, as a practical matter, not all victims of an employer's discriminatory acts can be individually identified. The Supreme Court recognized in the General Telephone case that, EEOC is charged in its pattern and practice litigation with a responsibility which goes beyond seeking relief for specific individual class members. The Commission must serve, as well, the public interest in the complete elimination of discriminatory employment practices.

The decisional law is clear; affirmative action is a legal and appropriate remedy for violations of Title VII.

It is important to note that the factual circumstances -- that is the continuing discrimination and pervasive employment disadvantages suffered by minorities and women -- which underlie existing public policy and EEO law has not been so markedly changed that Title VII and its affirmative relief are no longer critical to ensuring equal opportunities.

IV. Affirmative Action as Part of Voluntary Compliance

Voluntary compliance by an employer with the dictates of Title VII is central to the efficacy of the statute. The Supreme Court, in Alexander v. Gardner-Denver, emphasized the importance to Title VII of voluntary resolutions of disputes. In order to render meaningful EEOC's efforts to obtain such voluntary compliance, the Agency and covered employers must have available to them all the means of eliminating discrimination which could be judicially invoked. Thus, the courts have held that, once an employer determines that a particular race-conscious action is appropriate to remedy apparent employment discrimination in his workplace or the present effects of past discrimination, he is free to adopt voluntarily a reasonable affirmative action program.

The Supreme Court, in United Steelworkers v. Weber, recognized the importance of employer input in remedying Title VII violations. The Court pointed out: "Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted Federal regulation of private business. Those legislators demanded as a price for their support that management prerogatives and union freedoms... be left undisturbed to the greatest extent possible."

In the exercise of these prerogatives, employers prefer voluntary remedial action to litigated enforcement of Title VII. As a company witness testified during the Weber trial: "[w]e realized that if we did not do something on our own, then the Government was going to do it to us... [and] whatever their remedy is ... it's one heck of a lot worse than something we can work out ourselves."

The concept that a remedy under Title VII need not always be limited to the identifiable victims of proven discrimination is particularly applicable in the context of voluntary compliance. To force an employer to admit unlawful conduct as a precondition to remedy would eliminate a significant incentive for voluntary compliance and settlement without litigation. Such an admission might well be prejudicial to the employer in subsequent proceedings brought by persons outside the scope of settlement, and might subject the employer to liability beyond that which he would have incurred in litigation.

Another major reason why employers seek to resolve Title VII disputes voluntarily is the expense, both in actual cost and in disruption to the workforce, of litigation. The monetary incentive for voluntary settlement would be materially lessened were individual identification of victims required. The mechanisms for identifying the individual victims of discrimination are cumbersome at best. In the absence of the extensive and costly discovery engaged in at trial, any such determination would be to some degree speculative. Even if some mechanism existed for identifying victims in the course of voluntary compliance efforts, the cost and delay of that process would be prohibitive. For example, in the nationwide steel consent decree case, United States v. Allegheny-Ludlum Industries, Inc., it was conservatively estimated that individual determinations by a special master for the 60,000 claimants, with each person's case taking one hour to resolve, would consume 28 years of trial time. In U.S. and EEOC v. Lee Way Motor Freight, Inc., 25 FEP 182 (W.D. Okla., 1980) a case in which specific victims were identified and their claims individually adjudicated, the trial on the pattern and practice of liability was completed and an opinion rendered eighteen months after suit was filed. The hearings on the appropriate individual remedies consumed the next four years.

The expense and workforce disruption of proceedings such as those in Lee Way could, if required as a precondition to voluntary resolution, could render that type of resolution unfeasible. An employer who might otherwise seek to avoid the costs of litigation through voluntary compliance with Title VII, might find that such compliance entails the same expenditures and disruption without the potential for exculpation which he might obtain through litigation.

Against this backdrop, let me explain EEOC's Affirmative Action Guidelines. The Guidelines have three significant features. First, the Guidelines encourage voluntary action. Thus, the Guidelines provide a climate in which employers can undertake voluntary affirmative action, i.e., employment decisions appropriate to enable past victims of discrimination -- primarily minorities and women -- to overcome the effects of past or present employment policies which operate as barriers to equal opportunity. This is very important because Congress' intent in Title VII, as I noted earlier, was for employers to improve voluntarily the employment opportunities for past or present victims of discrimination. Second, the Guidelines clearly recognize that discrimination against all individuals because of race, color, sex, religion, or national origin is illegal under Title VII. The Guidelines make clear that charges of discrimination filed by non-minority male, will be processed by the Commission. Third, the Guidelines are EEOC's way of instructing employers as to how to harmonize a seemingly conflicting themes -- affirmative action and the duty not to discriminate. If employers adhere to the "three R's" of the Guidelines, they can institute affirmative action and be immunized from liability for discrimination. The "three R's" set out in the Guidelines are:

1. Reasonable self-analysis;
2. Reasonable basis for concluding a particular action is appropriate; and
3. Reasonable action.

The first "R" of the Affirmative Action Guidelines contemplates that employers will conduct a reasonable self-analysis. A reasonable self-analysis is one in which an employer determines whether any of his employment practices "exclude, disadvantage ... or result in adverse impact or disparate treatment of previously excluded or restricted groups or leave uncorrected the effect of prior discrimination, and if so, to attempt to determine why." A reasonable self-analysis is much like a blueprint. Both contain important specifications and the user knows the underlying reason for each figure. A self-analysis should cover all employment practices and their effect on protected groups.

The second "R" is that there be a reasonable basis for the employer's affirmative action. The Guidelines contemplate that employers evaluate their workforce or employment decisions to determine whether they have a situation which could be in violation of Title VII. No employer has to state publicly or privately to the EEOC that he has violated Title VII.

Reasonable action is the third "R" contemplated by the Guidelines. An affirmative action plan must be reasonable in relationship to the problem disclosed by the self-analysis. In considering the reasonableness of a particular affirmative action plan, the EEOC will generally apply the following standards: the plan should be tailored to remedy the problem identified in the self-analysis; the plan should be designed to ensure that employment systems operate fairly in the future while avoiding unnecessary restrictions on opportunities for the workforce as a whole; the plan, if it has race or sex-conscious provisions, can be maintained only as long as it is necessary to remedy the problem; and, if the plan includes goals and timetables, they must be reasonably related to considerations such as the effects of past discrimination, the need for prompt elimination of adverse impact or disparate treatment, the availability of qualified applicants, and the number of employment opportunities expected to be available.

It should be emphasized that only affirmative action plans adopted in "good faith, in conformity with, and in reliance upon" the Guidelines can receive the full protection of the Guidelines, including the immunity defense provided by Section 713(b)(1) of Title VII.[2]

The Guidelines also state that the EEOC will give comity to affirmative action plans developed pursuant to Executive Order 11246. This is important because many employers are government contractors and, therefore, subject to Executive Order 11246 as well as Title VII. In enforcing the Executive Order, the Office of Federal Contract Compliance Programs may have already required an employer to develop an affirmative action plan. The Guidelines state that an employer who has had a plan approved in order to come into compliance with the Executive Order, may rely on that plan to demonstrate compliance with EEOC's Guidelines. Hence, the government's approach in this area is coordinated and avoids potential conflicts between the two primary Federal agencies enforcing employment anti-discrimination laws.

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[2] This Section reads as follows: "(b) In any action or proceding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission,..."

I have attached a copy of the Guidelines to my presentation this morning and ask that they be made part of the record at this point. They are Appendix B.

VII. EEOC's Office of Interagency Coordination:

The Commission received interagency coordination responsibility in Reorganization Plan No. 1 of 1978 and in Executive Order 12067.[3] The Affirmative Action Guidelines, which I have just discussed, were among the first actions coordinated by EEOC pursuant to this responsibility. The Commission's office responsible for coordinating the Guidelines and all other external Federal EEO issuances is EEOC's Office of Interagency Coordination. The Office of Interagency Coordination has been extremely active since its beginning. There has been no change in this office's role in the new administration. For the record, I have attached the exchanges of correspondence between OMB and myself that makes this clear. They appear as Appendix D. This office's second annual report, covering fiscal years 1979-1980, is presently being printed at the Government Printing Office. I would be happy to provide copies of it and the office's first annual report to all the interested members of the subcommittee.

One of the matters presently being coordinated by this office is the Office of Federal Contract Compliance Program's Notice of Proposed Rule Making on Affirmative Action Regulations for Government Contractors Under Executive Order 11246.

The Commission applauds OFCCP's efforts to reduce burdens on smaller employers; to diminish the paperwork requirements of the contract compliance

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3/ A copy of Executive Order 12067 is attached as appendix C.

program; to introduce regulatory simplifications; and to reconcile the contract compliance requirements to the Guidelines issued by the Commission under Title VII.

The proposed regulations raise several issues that relate to the concerns expressed by the Subcommittee today. One of those issues is OFCCP's proposal to adopt higher threshold requirements which, we believe, would limit coverage of Executive Order 11246. Another issue is OFCCP's proposal to authorize Extended Duration Affirmative Action Plans without what we believe are proper safeguards.

Of course, I cannot predict for you this morning how the further negotiations required by Executive Order 12067 will affect these issues. I also cannot predict for you this morning how the Commission will act on these proposed regulations.

VIII. EEOC's Office of Systemic Programs:

Let me turn now to the Commission's Office of Systemic Programs. This office has made significant progress during the latter half of fiscal year 1981. This progress, we believe, will continue during fiscal year 1982.

The criteria used by the office for targeting respondents were adopted by the Commission on July 20, 1978. The criteria, which are published in the Commission's Compliance Manual, serve not only to guide systemic targeting but also to make respondents aware of the program's standards and focus. I have set out the criteria below:

1. Employers or other persons subject to Title VII who continue in effect policies and practices which result in low utilization of available minorities and women despite the clear obligation in Title VII to fairly recruit, hire and promote such persons;

2. Employers or other persons subject to Title VII who employ a substantially smaller proportion of minorities and/or women than other employers in the same labor market who employ persons with the same general level of skills;

3. Employers or other persons subject to Title VII who employ substantial numbers of minorities and/or women in low-paying job categories;

4. Employers or other persons subject to Title VII who maintain specific recruitment, hiring, job assignment, promotion, discharge, and other policies and practices relating to the terms and conditions of employment that have an adverse impact on minorities and women, and are not justified by business necessity. Such policies and practices may include, but are not limited to, those prohibited in the Commission's Guidelines on Discrimination Because of Sex, 29 C.F.R 1604; Guidelines on Discrimination Because of Religion, 29 C.F.R. 1605; Guidelines on Discrimination Because of National Origin, 20 C.F.R. 1606 the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. 1607; and other guidelines as may be adopted from time to time;

5. Employers or others subject to Title VII whose employment practices have had the effect of restricting or excluding available minorities and women from significant employment opportunities, and who are likely to be used as models for other employers because of such factors

as the number of their employees, their impact on the local economy, or their competitive position in the industry; and

6. Employers (a) who because of expanding employment or significant turnover rates, even if the employer's workforce is stable or in retrenchment, are likely to have substantial numbers of employment opportunities, and (b) whose practices may not provide available minorities and women with fair access to these opportunities.

These standards are necessarily broad, encompassing more employers than EEOC can review, given its present level of resources. Accordingly, systemic targeting has been further narrowed through informal guidance to our field offices in a field memorandum. The criteria set out in this memorandum are additional to those set out in EEOC's Compliance Manual. These criteria state that:

1. Employers with workforces of between 500 and 2,500 at the charged facility will be the primary focus or review;

2. Generally, a charge will involve either a one-facility employer or one facility of a multi-facility employer. However, where similar personnel systems, union contracts or similarity of jobs makes a broader investigation efficient and manageable, a multi-facility charge may be considered;

3. EEO-1 Reports for several years will be reviewed to determine whether there has been a significant decline in the employers' overall workforce and, therefore, insubstantial

hiring activity during the period immediately preceding the targeting;

4. Consideration will be given to recent improvements in an employers EEO profile despite continuing underrepresentation; and

5. Priority will be given to those targeted employers who show poor EEO performance on more than one basis.

The implementation of the criteria has, in our view, led to a more efficient use of the Commission's systemic resources since these factors are designed to focus on the worst discriminators first. They have led to the issuance of 130 systemic charges against employers to date. Our projections show, that they will lead to, an additional forty-five systemic charges during Fiscal year 1981.

During the last quarter of fiscal year 1981, new computerized models for targeting systemic respondents were completed and distributed to the field. These models will make it easier for EEOC's field offices to implement the Commission's systemic targeting program. While the models presently focus only on employers, they will be expanded soon to include unions and apprenticeship programs. The targeting models permit comparisons of employers who utilize similar job skills in various industries, as well as comparisons of the employment practices within a given industry. Employers are reviewed with respect to their overall employment profile, as well as by job and by specific protected class. Some of the other factors taken into consideration are location within an SMSA, size of the employer workforce, growth trends, and commuting patterns. Using a computer model and other targeting tools, the Office of Systemic Programs generated 23 new Commissioner charges during the third and fourth quarters of fiscal year 1981.

Charges in the system are progressing on schedule. During the fourth quarter of fiscal year 1981, the Commission issued its first seven systemic charge decisions under this program. These are now being conciliated. If these efforts fail, these charges will be referred for litigation. We expect to consider another forty-five to fifty such decisions during fiscal year 1982. Recognizing the benefits to government, industry and the victims of discrimination in voluntary resolution of Title VII disputes, we are making active efforts to settle these charges even prior to decision. However, even allowing for a substantial number of settlements, we anticipate that approximately 13 systemic lawsuits will be filed next year by our field offices, resources permitting.

X. Conclusion -- A Positive Note

Mr. Chairman and Members of the Committee, I realize that these hearings center on the subject of affirmative action. However, I would like to assure you that the EEOC is alive and well. There has been some concern about equal employment opportunity, but the public is not often able to assess the positive actions of their government in this vital area. I wish to report to you that the Commission's Title VII backlog, which stood at almost 70,000 charges as of January 1979, is now below 24,000 charges.

During the first three quarters of Fiscal Year 1981 charge processing figures show a continued climb in the area of production and benefits. During this period the Commission took in for processing 40,293 charges. Our field offices resolved 54,482 charges or 35% more charges than we have taken in. This represents a one-third increase in production over comparable figures for Fiscal Year 1980. In the Title VII area, the Commission has received 31,751 charges and resolved 45,456 or almost 45% more than we have taken in.

More important, Commission processes continue to provide substantial relief. Despite the extraordinary number of resolutions, the Title VII rapid charge settlement rate is holding at 43%. The settlement rate for Age discrimination charges has risen to 25%, and Equal Pay settlements have gone up to 27%.

Through nine months of 1981, approximately $60 million in relief has been obtained for 36,682 people. These figures exceed benefit attained for all of Fiscal Year 1980.

On the litigation side we recently settled four EEOC employment discrimination suits against the nation's largest retail employer, Sears, Roebuck and Co. The terms of the agreement were directed at insuring that Sears would implement procedures to monitor its own hiring practices in ways that should assure compliance with the law. We believe then and now that the agreement will enhance minority opportunities at Sears, and we hope to observe signs that will justify that belief in the near future.

On September 11, 1981 EEOC reached an agreement with Nabisco, Incorporated who agreed to establish a settlement fund for the benefit of a nationwide class of female bakery employees. The settlement, upon final approval by the U.S. District Court in Pittsburgh, Pennsylvania, will exceed $5 million.

In addition to the foregoing we obtained $4,997,705 through litigation for alleged victims of discrimination during the first six months of Fiscal Year 1981 which was a substantial increase over the $2,064,250 received over a comparable period during Fiscal Year 1980.

Thank you for inviting me to testify before this Committee.

APPENDIX A

(A Fuller Statement of Acting Chairman Smith's Views on Equal Employment And Affirmative Action)

I. Defining Affirmative Action

Affirmative action is a term which has been the subject of much public debate and confusion in recent years. 1/ It encompasses a wide variety of activities, some of which have extensive public support, and some others which a few have intensely criticized. Affirmative action can be defined as actions appropriate to overcome the effects of past or present policies or other barriers to equal employment opportunity. Simply stated, an affirmative action plan, is no more than a systematic organizational effort to reach certain management objectives based on sound organizational analysis and problem identification; it is a plan designed to comprehensively correct the discriminatory process through anti-discriminatory measures that may be race, sex, and national origin conscious.

Some examples of appropriate means to affirmatively eliminate employment barriers, which in design and execution may be race, color, sex or ethnic "conscious", include:

> A recruitment program designed to attract qualified members of the group in question; A systematic effort to organize work and re-design jobs in ways that provide opportunities for persons lacking 'journeyman' level knowledge or skills to enter and, with appropriate training, to progress in a career field; Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications; The initiation of measures designed to assure that members of the affected group who are qualified

> to perform the job are included within the pool of persons from which the selecting official makes the selection; and a systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs. 2/

In short, affirmative action is a concept that seeks to achieve two objectives: (1) the elimination of barriers that have kept minorities and women out of the economic mainstream, and (2) the initiation of positive measures that ensure a true equal opportunity for those previously excluded. An affirmative action plan is the vehicle to accomplish these two objectives. An affirmative action plan may be implemented after judicial, legislative or administrative findings of constitutional or statutory violations. Alternatively, in appropriate circumstances, an affirmative action plan may be adopted voluntarily even though there has been no governmental finding of discrimination.

The Supreme Court has held that following a determination of liability under Title VII of the Civil Rights Act of 1964, the courts have the power to order relief which will "make persons whole for injuries suffered on account of unlawful employment discrimination." 3/ Section 706(g) of Title VII vests broad equitable powers in the courts to "order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees, with or without back pay...or any other equitable relief as the court deems appropriate." 4/ All nine of the Federal Courts of Appeals that have considered the legality of fixed goal requirements have found them lawful when necessary to remedy discrimination, and the Supreme Court has declined to review these rulings. 5/

It should be clearly understood that Title VII does not impose different standards and remedies on government employers than on private employers. *Blake* v. *City of Los Angeles*, 595 F.2d 1367, 1372, 1374 (9th Cir. 1979) and *Firefighters Institute* v. *City of St. Louis*, 549 F.2d 506, 510 (8th Cir.) *cert. denied*, 434 U.S. 819 (1977). State or local governments may be directed to implement hiring or promotion goals following a determination that Title VII has been violated. *United States* v. *City of Buffalo*, 633 F.2d 643 (2d Cir. 1980), *United States* v. *City of Chicago*, 573 F.2d 416, 420-424 (7th Cir. 1978). Of course, affirmative action plans developed by public employers are subject to Constitutional limitations. Public employers may voluntarily establish racial classifications for ostensibly benign purposes, but only if the classifications serve an important and articulated purpose and if they are reasonably used in light of these objectives. Such classifications may be created following a judicial, legislative or administrative determination that there has been a Constitutional or statutory violation.

With regard to voluntary affirmative action, the United States Supreme Court made clear in *United Steelworkers of America* v. *Weber*, *6/* that employers may adopt a voluntary affirmative action plan based upon a self-assessment that there is an under-representation of certain groups in its workforce. Thus, an employer may voluntarily attempt to correct its workforce imbalance, regardless of whether it was caused by its own discriminatory actions or those of the society at large. The Supreme Court concluded, that to hold otherwise, would contravene Congressional intent in enacting Title VII that "management prerogatives and union freedoms...be left undisturbed to the greatest extent possible." *7/*

Both private enterprise and labor unions have utilized voluntary affirmative action measures. They have done so when a self-evaluation of past and present employment practices and an analysis of the workforce compared with the available qualified labor pool, indicated that something other than mere chance may have been responsible for explaining the under-participation of qualified minorities and females in the company's workforce. Prudent management has dictated the adoption of voluntary affirmative action and the taking of corrective steps rather than awaiting costly litigation and a possible adverse adjudiciation.

An example of a voluntarily adopted private affirmative action plan is the one at Kaiser Aluminum and Chemical Corporation's Gramercy, Louisiana plant. The affirmative action program was initiated after Kaiser Aluminum and the United Steelworkers of America negotiated a collective bargaining agreement which included an affirmative action provision for an on-the-job training program for the skilled craft job category. The program provided that trainees would be selected on the basis of seniority, but that 50% of the trainees were to be Black until the percentage of Black skilled craft workers at Kaiser Aluminum was approximately the same as the percentage of Blacks in the local labor force.

There are some significant points that must be noted about the Kaiser plan. In instituting this plan, both the company and the union had believed that a gross underrepresentation of Black skilled craft workers in the company was not the result of past discrimination by the company. There was a serious shortage of Black craft workers generally in the local labor market, and this was due to well known past discrimination by craft unions and union apprenticeship programs that excluded Blacks from obtaining those skills. Kaiser's efforts to recruit Black skilled workers had been unsuccessful because of the shortage of Black craft workers in the local labor market. Therefore, in order to eradicate the effects of past societal discrimination

Kaiser and the United Steelworkers instituted a costly training program for non-craft Kaiser employees. The training program was made available to all non-craft Kaiser employee--Black as well as White. This is a good example of how affirmative action plans very often provide concrete benefits for all workers regardless of sex or race. 8/

Some good faith voluntary affirmative action efforts have become the target of so-called "reverse discrimination" complaints against management. It became clear that unless the government agency in charge of monitoring compliance with the anti-discrimination statutes stepped in to provide some guidance, prudent employers would be deprived of their prerogative to initiate business planning that minimizes potential risks, clearly something that Congress never intended to happen. In recognition of this need for guidance, in January 1979, the Commission adopted Guidelines on Affirmative Action 9/ which delineated the scope of appropriate affirmative action under Title VII. These guidelines provide guidance to employers who want to initiate a voluntary affirmative action program, and offer some immunity to those employers who take good faith initiatives to come into compliance with the statute. The Guidelines allow employers to anticipate and to take corrective steps before their employment practices become a problem, subjecting them to Title VII liability.

II. Misconceptions about Affirmative Action

A number of erroneous assumptions have been made by some people about affirmative action. An affirmative action plan is not a license to discriminate against non-targeted groups, such as White or male employees; it is not a license to prefer unqualified minorities or women over qualified Whites or men. Court decisions and the Equal Employment Opportunity Coordinating

Council's Policy Statement on Affirmative Action make it clear that equal employment opportunity laws do not require the employment of unqualified persons. 10/ However, employers are required to examine qualification standards to insure that their standards predict successful job performance. Selection procedures which are not job related and operate to exclude women and minorities should be discarded as discriminatory. This evaluation of employment criteria does not lower standards; it merely requires that the criteria are appropriately tailored to fit the needs of employers.

A permissible affirmative action plan must not "unnecessarily trammel the interests of the white [or male] employees." 11/ For example, Whites may not be discharged to make room for Blacks and the affirmative action program may not bar Whites from advancement altogether. The plan must be temporary in nature, not intending to maintain a fixed racial or sexual balance in the workforce, but rather to eliminate a manifest racial or sexual imbalance.

Critics of affirmative action claim that it requires the proportional representation of women and racial groups in every organization and institution and compels a system of group entitlement. Group classifications are only a means of facilitating an analysis of employment practices. To be remedied, discrimination must first be identified, and it cannot be corrected without permitting race, national origin and sex categorization in the collection of evidence. Absent discrimination, an underrepresented group has no entitlement because group categorization is not meant to serve as a method for the allocation of benefits or opportunities.

However, where class wide discrimination exists, effective enforcement of our nation's equal employment opportunity laws requires class oriented relief. Discrimination by its very nature relies on invidious classifications on the basis of group characteristics. To treat discrimination as merely an individual problem ensures the perpetuation of employment practices our nation has resolved to eradicate. In recognition of this, Congress in 1964 gave the Attorney General of the United States the power to bring equal employment pattern and practice suits. 12/ Effective in 1974, this statutory responsibility for systemic enforcement was transferred to the Equal Employment Opportunity Commission, 13/ a responsibility which we consider to be critical to the full and effective enforcement of our nation's equal employment opportunity laws.

There has been considerable argument and confusion about the use of quotas, goals, and statistics in the context of affirmative action. The use of statistical methods of proof in discrimination cases is well established.

As the Supreme Court stated in Teamsters v. United States 14/:

> ... absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though Section 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population.

The Court further stated that where gross disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination. Statistical comparisons between an employer's work force composition and that in the relevant labor market area are both probative for finding discrimination and for judging an employer's efforts to implement an affirmative action plan. Thus, use of numerical goals in an affirmative action plan, be it for hiring, training, promotion, transfers or layoffs, is no more and no less than classical management by objectives. Businesses typically measure their success by comparing their performance to certain pre-determined expected goals, be they selling, servicing or manufacturing; so too a business establishes objectives for affirmative action and measures its progress towards these objectives. From EEOC's viewpoint, investigative findings are based at least in part upon numerical measures. When the numbers are seen to be reaching par with realistic external standards at a pace that makes up for past exclusion in a reasonable amount of time, they offer some assurance that identified violations have been corrected and the harm redressed.

Goal setting in affirmative action is a reasoned process. 15/ It requires a review of current employment levels; assessment of internal and external availability of qualified protected class candidates; projection of anticipated vacancy and turnover rates; and consideration of other relevant factors such as special working conditions and collective bargaining agreements. When this is completed, the process calls for projection of numerical objectives for each year over a planned and fixed time period. Goals may be by individual job titles or combined related job groups and are expressed in terms of percentage of selection, short or long term participation rates or other appropriate measurements.

Achievement of goals is normally conditioned by evidence of good faith efforts by employers, since it is impossible to predict with certainty employment levels and needs, and there is no assurance that qualified and interested targeted class individuals will be available for selection when job openings occur. The employer exhibits good faith by complying with the procedural requirements of the affirmative action plan and by otherwise establishing a record of positive effort and intent.

Goals are simply numerical results which are expected to follow from the operation of the affirmative procedures adopted in a plan. If they are not achieved, it is a warning signal to critically re-examine the employment practices to determine whether the failure to achieve those goals is the result of discriminatory employment procedures that may still be operating to disadvantage the employment opportunities of the targeted group.

III. Discrimination: The Problem Affirmative Action Seeks to Remedy

A thorough understanding of affirmative action is not possible without reference to the problem it seeks to cure. Affirmative action is a remedy for the disease of discrimination which still exists in epidemic proportions in America. As stated in the U.S. Commission on Civil Rights' publication, Affirmative Action in the 1980's: Dismantling the Process of Discrimination (1981, at p. 5):

> Discrimination has become a process that builds the discriminatory attitudes and actions of individuals into the operations of organizations and social structures (such as education, employment, housing and government). Perpetuating past injustices into the present, and manifesting itself through statistically measurable inequalities that are longstanding and widespread, this discriminatory process produces unequal results along the lines of race, sex, and national origin, which in turn reinforce existing practices and breed damaging stereotypes which then promote the existing inequalities that set the process in motion in the first place.

When such a discriminatory process is at work, insistence upon neutrality and color-blindness insures the continuation of current inequitable practices. It is this ongoing cycle of discrimination permeating our society which affirmative action seeks to remedy. When this discriminatory process has been dismantled, affirmative action will no longer serve any legitimate social purpose and will no longer be justifiable.

People who are a generation or two removed from an era when discrimination against minorities and women was governmentally required or sanctioned and almost universally practiced by private parties may not feel any responsibility for the past. Nevertheless, our shared history has laid the foundation for both the afflictions of today and the need to find a cure for the future.

From the early 1600's to 1865, Blacks in this country, with few exceptions, were held in bondage. Although there have been other slave systems in the world, slavery in the United States was unique to the extent to which race was the determining factor for slave status. 16/ In the Dred Scott decision of 1857, 17/ Mr. Chief Justice Taney, speaking for a majority of the United States Supreme Court, described the American perception of Blacks at the time of the foundation of our nation, in these graphic terms:

> [Negroes]...were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them.
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> * * * *
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> Negroes had for more than a century before been regarded as beings of an inferior order; and altogether unfit to associate with the white race...and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race.

Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 404-405, 406 (1857).

The Civil War emancipated the Blacks, but produced few changes in their social or economic status. 18/ Some states enacted Black codes in an attempt to perpetuate White persons' ability to control and profit from the labor of Blacks. 19/ Although at the time of Reconstruction, a great majority of artisans and skilled workers in the south, for example, were Blacks, widespread action had already begun to evict them from the skilled occupations. 20/ For example, laws were enacted prohibiting White persons from forming labor contracts with "colored" mechanics or masons. 21/

The newly developing unions either excluded Blacks completely or relegated them to segregated chapters and to the lowest paying and most disagreeable jobs. 22/ Before emancipation, it had been illegal to teach slaves to read and write. 23/ The entry of Blacks into the professions was restricted by this enforced illiteracy and their exclusion from professional schools.

In 1896, the Supreme Court decided Plessy v. Ferguson, 24/ sanctioning the separate and unequal conditions in which Blacks would live until 1954 when Plessy was overturned by the decision in Brown v. Board of Education. 25/ The existence of "grandfather clauses," poll taxes, and literacy tests effectively denied Blacks the right to vote. Lynching was prevalent as an informal method of social control of Blacks until well into this century. 26/

Discrimination by the White majority has not been limited to Blacks, but has operated to the disadvantage of other racial and ethnic groups as well, including American Indians, Asians, Hispanics, and other non-majority persons. 27/ Moreover, federal and state laws have sanctioned various forms of discrimination against women of all races and ethnic backgrounds. 28/

To be sure, in the last 20 years, we have passed laws repudiating more than 200 years of inequality and disadvantage. Nevertheless, the blatant racial and sexual discrimination of our recent past continues to manifest itself in the present. We have decreed by law that minorities and women are no longer inferior to other Americans, but as de Tocqueville recognized long before slavery was abolished: "A natural prejudice leads a man to scorn anybody who has been his inferior, long after he has become his equal; the real inequality...is always followed by an imagined inequality rooted in mores." 29/

Of the 3,000 Black households surveyed nationwide in a 1979 study by Mathematica, a research firm, two-thirds of Black heads of households said that they believed there was still a great deal of discrimination in the United States. 30/ A recent survey conducted by Data Black of New York City found that 60 percent of Black college graduates said they had encountered job discrimination. 31/

As a result of deeply engrained prejudices and customs, employers continue to treat minorities and women less favorably because of their race, national origin, or sex. This disparate treatment may be an integral part of well established employment practices. For example, some minorities and women are still being channelled into lower paying, lower status jobs, regardless of qualifications. 32/ This process often begins at the recruitment stage when ads are selectively placed in the minority press for unskilled jobs but not for skilled positions. While many newspapers have abandoned the practice of sex segregated ads, sex segregation in the occupations is still a widely prevalent phenomenon in today's society. Traditionally, female and minority jobs have been consistently under-paid and characterized as lower status.

Employment interviewers often perceive women and minorities as being less promising candidates than White males with similar qualifications. When interviewers perceive a similarity between applicants and themselves, according to a number of studies, 33/ they are likely to give higher ratings to the applicants. Since a high proportion of interviewers are non-minority males, this tendency works to the disadvantage of minority and female applicants. Interviewers are often influenced by superficial characteristics unrelated to job success. 34/ These factors include race, sex, physical attractiveness and manner of dress. Interviewers often have stereotyped views which operate against minorities, especially when an applicant does not conform to middle class standards. Women are still perceived as being more likely to quit a job after marriage, to have family responsibilities which will impair their ability to do their jobs, and as unable to successfully supervise males. 35/

Although many companies have now adopted affirmative recruitment practices which enable them to interview many more minority and female applicants, affirmative action cannot stop at the recruitment stage. Different hiring and promotion standards for minorities and women still permeate the employment world. In a number of fields where minorities have never been hired before, qualifications have been increased with leniency in the hiring process practiced only for non-minority male applicants. 36/ Better qualified minorities may still find themselves being passed over for promotions. For instance, in a trucking company, Black workers were required to train lesser qualified White workers to prepare for their promotion to higher paying jobs which the Black instructors themselves were barred from entering. 37/

Employers who engage in discriminatory practices like those discussed above are subject to liability under Title VII. In recognition of the fact that employers are not likely to confess a discriminatory motive for their actions, particular patterns of employer conduct have been held by the courts to create an inference of discriminatory intent. The employers' discriminatory motivation is thus inferred, justifying the imposition of liability.

Well established rules, practices and policies of employers often perpetuate discrimination although they do not purport to treat groups differently on the basis of race, national origin or sex. The infamous "grandfather clauses" were an example of a facially neutral policy which preserved the inequities of the past. These laws, enacted by some states, provided that only those individuals whose grandfathers had voting privileges were entitled to vote. Blacks, most of whose grandfathers were slaves and unable to vote, were effectively disenfranchised.

However, today, neutral employment practices which have a disproportionate adverse impact on women and minorities are often accepted as proof of discrimination.

Employment practices, like word of mouth recruitment used by employers with a predominantly non-minority male employee population, perpetuate the existing make up of the labor force. 38/ Studies of white and blue collar workers have shown that they found their jobs through the use of personal networks more often than through any other method. 39/ In the same way, failure to publicize promotional opportunities can have an adverse impact on minority and female candidates employed in a predominantly White male environment. Preference given to friends and relatives of present employees may also have a similar adverse impact on minorities and women. 40/ Employers which recruit new employees through walk-ins may end up with a predominantly

White workforce if they are located in communities in which minorities do not live. 41/ Suburbanization of business operations and widespread residential segregation make this problem a very real one. Also, employer dependence on unions or employment agencies with discriminatory referral systems hurts the employment opportunities of minorities and women. 42/

Reliance on educational credentials and test scores of various kinds to screen applicants for hire or promotion is a widespread practice. Where these requirements cannot be shown to predict successful job performance, and they unfairly exclude women and minorities from employment opportunities, they violate Title VII. Inferior educational opportunities make minorities less likely than Whites to have many of these formal credentials. 43/ In fact, some of the incumbent management officials imposing these degree requirements do not have these credentials themselves. Discriminatory counseling as well as traditional family influences may affect the extent to which women meet formal degree requirements. 44/ Additionally, differences in the cultural backgrounds of test designers and minority test takers may affect minority performance on screening tests. 45/

Employment practices which are "facially neutral" in their treatment of different groups, "but that in fact fall more harshly on one group than another and cannot be justified by business necessity" 46/ subject an employer to liability under equal employment laws. In Griggs v. Duke Power Co., 47/ for example, the Supreme Court of the United States found that a high school diploma requirement and a passing score on an intelligence test were impermissible prerequisites for certain job categories where they operated to exclude Blacks and could not be related to job performance. Mr. Chief Justice Burger wrote that in passing Title VII of the Civil Rights Act of 1964, Congress required the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 48/

The external indicators of the vicious discriminatory cycle are impossible to ignore. According to the U.S. Department of Labor, Blacks and other racial minorities are unemployed at twice the rate of Whites. 49/ Unemployment among the minority youth population is at epidemic proportions. 50/ Moreover, according to 1980 annual average data on weekly median earnings taken from the Current Population Survey (CPS), which is conducted monthly by the Bureau of the Census, Black and Hispanic full-time wage and salary workers earned only 80 cents and 78 cents respectively for every dollar earned by Whites employed full-time. Women employed full-time earned only 63 cents for every dollar earned by their male counterparts. These disparities continue, even within individual CPS job categories and in some cases actually became larger. In the manager and administrative job category (exclusive of farm managers), for instance, women employed full-time earned only 59 cents for every dollar earned by full-time male workers. Blacks and Hispanics employed full- time as managers and administrators earned some 80 cents and 86 cents respectively for each dollar earned by their White counterparts. 51/

Significant disparities also continue to exist in employment patterns of minorities and women, as compared to White men. This is evident from employment data based upon the Commission's survey of private employers, called the Employer Information Report (EEO-1). 52/ Although this EEO-1 survey is generally limited to those employers having 100 or more workers, it is the only employer-based source of racial and ethnic employment data nationally available. The latest available EEO-1 data, covering 1979, make clear the present extent of the disparities in employment patterns among the various population classes. For instance, 32.1% of the 13.6 million women employed by companies covered in the 1979 EEO-1 survey, were employed in office and clerical jobs. (See Table 1, attached.) This concentration held for minority as well as White women. (See Table 3, attached). Of the over 20 million male workers covered in 1979, however, only 4.6% were in this category. On the other hand, only 2.6% of all employed women were in craft jobs compared with some 19.0% of all men. (See Table 1, attached).

With regard to minorities, they continued to be underrepresented in such EEO-1 job categories as officials and administrators, professionals and technicians. For instance, only 2.6% of the 2.1 million Black men employed by surveyed companies in 1979 were in the professional job category, whereas 10.5% of the 16.7 million White men were in this category. Of the 1.1 million Hispanic men covered in the 1979 EEO-1 survey, only 3.3% were in the professional field. (See Table 2, attached).

It is often helpful to restate the relative earning positions of minorities and women in terms of a total dollar amount, covering all such affected individuals. Taking 1980 Current Population Survey data on full-time Black wage and salary workers as an example, it is clear that these workers continue to suffer below-average earnings not only because of lower earnings in any particular job category, but also because of their employment concentration in such low-paying jobs as laborers. 53/ Their below-average earnings in any given job category might be called a negative earnings effect. An illustration of this negative effect is presented by the 1980 CPS data in the managerial and administrative field (exclusive of farm managers) where Blacks earn some $307 weekly as compared with the $380 earned by all workers in that field.

The concentration of Blacks in lower-paying jobs, on the other hand, might be called a negative employment effect. Again, the managerial job category might be used to indicate just how such employment impacts upon Blacks. According to the 1980 Current Population Survey, only some 4.4% of all full-time managers and administrators (excepting in farming) are Black, whereas Blacks comprise 10.4% of all full-time workers in the work force. Since full-time wage and salary workers in this field earn substantially more per week than do all full-time wage and salary workers (*i.e.*, $380 versus $266 a week), this underrepresentation has a negative impact on the earnings of Blacks as a class.

Summed over Current Population Survey data for all job categories, Blacks, as a class obtained some $232 million a week less than the average of all full-time wage and salary workers because of depressed earnings (earnings effect) and some $142 million a week less because of their concentration in lower paying jobs (employment effect). These two components add up to approximately $374 million a week which full-time Black wage and salary workers fail to receive because they are not at employment or earning parity with other workers. This translates into a gap or loss of some $19 billion a year. Obviously, this gap or loss is attributable to many factors, including differences in education, type and length of work experience, and age. Most assuredly, however, part of this gap must be attributed to continuing unfair employment barriers and, more importantly, it must be redressed if we are to achieve an open and fair economy.

Few persons today are unaware of the deeply rooted nature of the social problems which are the fruit of this process of discrimination. The effects of discrimination touch all of our lives. As Chief Judge J. Skelly Wright wrote recently (emphasis in original); 54/

> How can we expect Blacks and other minorities of disadvantaged groups to feel they have a stake in the present system? They are denied the fruits of the nation's bounty. They are crowded together in the nation's slums; they suffer widespread unemployment; they receive the worst of most social services; they bear the brunt of the nation's brutalities. As they survey our white legislatures and congresses, our white courtrooms and bureaucracies, must they not feel that their citizenship is second-rate—that no matter what the Constitution may say about their equality as citizens, they are unequal and ruled from above? And if this *objective* inequality undermines the bond of community felt by black Americans, the fact that it was the *deliberate* product of oppression by the white majority should make white Americans marvel at the continued patience and patriotism of their black countrymen. Plainly, the disadvantaged position of blacks and members of other minority groups is a structural flaw in our political system, and an abomination.

IV. Bipartisan and Public Support for Affirmative Action

The last four decades have seen bipartisan recognition of and efforts at elimination of discrimination; these efforts began with the announcement of principles of non-discrimination, and then after realizing the inadequacy of these principles to make a real dent in the problem, the last two decades have seen an increasingly greater bipartisan emphasis on affirmative action.

Since President Roosevelt's administration, the Executive Branch has issued a series of Executive Orders designed to promote non-discrimination in employment. President Kennedy's Executive Order 10925, issued in 1961, took a great step forward; it directed government contractors not only to refrain from discrimination but to undertake "affirmative action" to achieve equity in employment practices. President Johnson's Executive Order 11246 in 1965 put real muscle into affirmative action measures, making many job markets penetrable for the first time by groups previously discriminated against.

President Nixon continued the work of his predecessors when he issued Executive Order 11478, firmly restating the government's policy of providing equal opportunity in federal employment. Under this Executive Order, the heads of executive departments and agencies were required to establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within its jurisdiction.

Beginning with the Civil Rights Act 1964, Congress has shown the same keen awareness of the need for affirmative action. In Title VII of the Act, Congress authorized the courts to order affirmative action, whenever deemed necessary, to correct proven violations.

Moreover, while Title VII explicitly provides that it does not require employers to grant preferential treatment to any individual or group on the basis of its race, color, religion, sex or national origin, 55/ it leaves undisturbed management prerogatives to voluntarily undertake affirmative action in appropriate circumstances.

Section 717 of Title VII which prohibits discrimination in federal employment requires that federal agencies develop and implement affirmative action plans in order to correct underrepresentation of minorities and women in the federal government. Affirmative action efforts of the federal government include federal equal opportunity recruitment program plans developed pursuant to the requirements of Section 310 of the Civil Service Reform Act of 1978 (the "Garcia Amendment").

A majority of Americans accept affirmative measures as being necessary to correct the effects of centuries of discrimination against minorities and women. According to a study conducted by Louis Harris and Associates in early 1979, a majority of Whites in America favor affirmative action programs for

Blacks in industry and in educational institutions as long as rigid quotas are not used. 56/ A survey by the American Council of Life Insurance Companies, also conducted in 1979, found that of 3,729 individuals surveyed, 71% said that it is fair for business to set up specialized training programs solely for minorities and women. 57/

Most corporate executives accept affirmative action as an integral part of their business systems, according to a survey of 300 top executives in the country conducted by Barnhill-Hayes, Inc., of Milwaukee. About 72% of the respondents said productivity is not hampered by minority hiring and 50% disagreed with the view that an employer's affirmative action burden is unfair. 58/ Many labor unions have demonstrated their keen interest in affirmative action. For instance, the AFL-CIO, the United Steelworkers, the International Union of Electrical Workers, the United Autoworkers and the Coalition of Labor Union Women have expressed their interest in playing a greater role in the promotion and development of employer affirmative action plans. 59/

V. Costs and Benefits of Affirmative Action

I am not willing to put a price tag on freedom, justice and equality. The colonists, during the Revolutionary War did not weigh those cherished goals on economic scales, nor should I. To them the principle of equality was too self-evident to require an accountant's judgment. But even so, allow me to mention just a couple of recent and reputable cost estimates that have been offered in connection with EEOC paperwork and affirmative action.

According to a 1978 estimate by the GAO, business used about 69 million hours annually at an estimated cost of over $1 billion to respond to more than 2,100 federal reporting requirements. 60/ Of this total, the EEOC's paperwork burden was estimated at only 0.8 million hours, that is only 1.1% of the total paperwork burden. The U.S. Chamber of Commerce claimed that the Office of Federal Contract Compliance Program's (OFCCP's) paperwork burden was roughly the same as that of the EEOC. 61/ So, even if one were to double the EEOC estimate, that burden is only slightly above 2% of all federal paperwork requirements.

Another cost estimate was prepared by Arthur Andersen and Co. for the Business Roundtable. 62/ Direct incremental costs in complying with regulations of six Federal government agencies were studied in 48 companies, covering more than 20 industries. Direct incremental costs were the costs incurred by these 48 companies during 1977 in order to take the necessary steps to comply with various regulations and which would not have been incurred in the absence of the regulations.

The total incremental cost attributable to both the EEOC and the OFCCP was some $217 million, or 8.3 percent of the total $2.6 billion cost of regulation attributable to the six federal agencies studied. Of this $217 million cost of EEO activities, some three-quarters or $165 million was attributed to affirmative action programs.

The relative impact of these cost figures on the companies studied can be seen by comparing the cost figures to total company sales. This comparison reveals that incremental cost for all EEO activities was less than 0.1% of total sales, whereas the cost for affirmative action programs was approximately 0.07 percent of total sales.

Dismantling or weakening affirmative action programs already in place would halt the economic and social advances that are finally being made. As more minorities and women have gained access to higher education, their representation in the professional and official and managerial job categories, has risen, as it generally has in all better paying jobs. These changes are evident, again from employment data based upon the EEO-1 survey. For instance, the percentage of women in the professional field rose from 4.2% out of 7.8 million women employed by surveyed companies in 1966 to 7.9% of their total in 1979. In the official and managerial job category, the percentage of women rose from 2.4% in 1966 to 4.9% in 1979. (See Table 1, attached.)

These gains were above and beyond the general movement in the U.S. economy during the past decades, which was away from production or plant jobs and into service or office jobs. Thus, for instance, EEO-1 managers and officials increased from 2.0 million jobs in 1966 to 3.7 million jobs in 1979, for a total growth of 1.7 million jobs over the period. Women, meanwhile, went from 327,000 jobs in 1966 to 673,000 jobs in 1979 for an increase of 346,000 jobs in the managerial and official field. However, for each 100 new jobs in that field, women accounted for nearly 21 of them, which of course provides a rate of increase substantially larger than their 1979 employment percentage of 4.9% in that field (i.e., 346,000 jobs divided by 1.7 million jobs equals 0.207, which rounds to 21 per 100 new jobs).

Changes in the employment patterns of Black and Hispanic men between 1966 and 1979 also indicate areas of improvement in providing equal employment opportunity and eliminating a segregated workplace. Both classes, first of all, registered dramatic percentage gains in the managerial and professional fields. Black men employed as officials and managers, for instance, comprised 0.9% of the 1.4 million Black male workers covered in the 1966 EEO-1 survey. By 1979, this group was 4.8% of the total of 2.1 million Black men employed. The percentage of Hispanic male officials and managers, meanwhile, rose from 2.5% of the total 0.4 million Hispanic men covered in the 1966 EEO-1 survey to

5.6% of the 1.1 million Hispanic men covered in 1979. Black men registered similarly impressive gains in the professional job category, going from 0.8% in 1967 to 2.6% in 1979. These growth rates, again, were larger than the total (all population classes) growth rates in these fields. (See Table 2, attached.)

Both Blacks and Hispanics have also experienced increases in their percentages of craft jobs during the 1966-1979 time period, even though the percent of U.S. employment in this field, as measured by the EEO-1 survey, was declining (i.e., from 14.5% in 1966 to 12.4% in 1979). Thus, for instance, the percentage of Black men in craft jobs went from 8.0% of their 1966 EEO-1 employment total to 14.1% of their 1979 employment total. The respective percentages of Hispanic men were 14.2% in 1966 and 16.6% in 1979. (See Table 2, attached.) Finally, it should be mentioned that according to 1980 CPS data, the median salary of full-time craft workers was $328 a week, compared to $266 earned by full-time workers in all job categories. In other words, craft jobs tend to offer better than average earnings.

Despite these gains which are often impressive, the occupational distributions of women and male minorities still indicate concentration in lower-paying jobs, when compared with the total occupational distribution of all workers. The fact that women are concentrated in office and clerical jobs has already been mentioned. Such jobs, according to CPS figures, offer median earnings of some $214 a week for full-time workers which, of course, is below the $266 a week earned by all full-time workers.

Minority men, on the other hand, tend to be concentrated in the laborer and operative job categories, more so than White males. According to the 1979 EEO-1 survey, for instance, 17.2% of all Black men, and 20.5% of all Hispanic men were employed as laborers. (See Table 2, attached.) Only 7.5% of all

White males were similarly employed. Full-time non-farm laborers, according to the 1980 CPS, had median earnings of $220 a week which is substantially less than the $266 earned by all workers.

VI. Conclusion

Opponents of affirmative action claim that our Constitution is color blind and mandates that our laws be administered with absolute neutrality. These critics argue that the government should remain aloof from the matter of color and treat all citizens exactly alike.

It is fallacious to argue that the interpretations of our laws must remain color blind when in fact they have never been applied in a neutral manner. Our nation's founding persons proclaimed that "all men are created equal" but they also gave us a Constitution which accorded to Black slaves the fractional status of three-fifths of a free person, and provided a fugitive slave clause to preserve the White master's control over his slaves. Until the arrival of the third decennium in this century, women citizens of this Republic were denied the basic political right, the right to vote. Until the middle of this century, the Equal Protection Amendment to the Constitution, enacted at the cost of a civil war, meant only that Blacks were entitled to separate but manifestly unequal treatment.

We cannot lay claim to a tradition of color and sex blind administration of our laws. In view of this, it does not behoove us to suddenly make the Constitution color and sex blind. However, it is my hope that one day this will change; that one day the badges of slavery will no longer haunt our nation.

As Mr. Justice Blackmun put it: "In order to get beyond racism, we must first take account of race.... And in order to treat persons equally, we must treat them differently. We cannot--we dare not--let the Equal Protection Clause perpetuate racial supremacy." 63/

FOOTNOTES

1/ Smith, "Managing in a Multi-Ethnic, Multi-Racial Workforce", 40 Fed. Bar. News and Journal 163 (1981).

2/ Equal Employment Opportunity Coordinating Council, Policy Statement on Affirmative Action Programs for State and Local Government Agencies, 41 Fed. Reg. 38,814 (1976) as quoted in Interpretative Guidelines on Affirmative Action, 44 Fed. Reg. 4422, 4427 (1979).

3/ Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

4/ Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(g) (1972). Also, §501 of the Rehabilitation Act of 1973, enforced by the EEOC, provides for equal employment opportunity for handicapped individuals in the federal government and incorporates by reference the affirmative remedies set forth in §706(g) of Title VII. 29 USC §794a (1973).

5/ FIRST CIRCUIT: NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); Associated General Contractors v. Altshuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); SECOND CIRCUIT: Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Bridgeport Guardians, Inc. v. Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973), cert. denied, 421 U.S. 991 (1975); United States v. Wood, Wire & Metal Lathers Local 46, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973); Vulcan Society v. Civil Service Commission, 490 F.2d 387 (2d Cir. 1973); THIRD CIRCUIT: Erie Human Relations Commission v. Tullio, 493 F.2d 371 (3d Cir. 1974); Contractors Association v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971); FOURTH CIRCUIT: Sherrill v. J.P. Stevens & Co., 410 F.Supp. 770 (W.D.N.C. 1975), aff'd, 551 F.2d 308 (4th Cir. 1977); FIFTH CIRCUIT: NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) en banc, cert. denied, 419 U.S. 895 (1974); Local 53, Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); SIXTH CIRCUIT: United States v. Masonry Contractors Ass'n, 497 F.2d 871 (6th Cir. 1974); United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); Sims v. Sheet Metal Workers Local 65, 489 F.2d 1023 (6th Cir. 1973); United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir.) cert. denied, 400 U.S. 943 (1970); SEVENTH CIRCUIT: United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977), cert. denied, 434 U.S. 875 (1977); Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); EIGHT CIRCUIT: Firefighters Institute for Racial Equality v. City of St. Louis, 588 F.2d 235 (8th Cir. 1978), cert. denied, 443 U.S. 904 (1979); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); Carter v. Gallagher, 452 F.2d 327 (8th Cir. 1971) en banc, cert. denied, 406 U.S. 950 (1972); NINTH CIRCUIT: United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971).

6/ 443 U.S. 193 (1979).

7/ *Id.*, at 206, citing H.R. Rep. No. 914, 88th Cong., 1st Session, pt. 2 (1963), at 29, U.S. Code Cong. & Admin. News 1964, p. 2391.

8/ See also, e.g., *EEOC* v. *AT&T*, 419 F.Supp. 1022, (E.D. Pa. 1976) *aff'd*, 556 F.2d 167 (3rd Cir. 1977) *cert. denied* 438 U.S. 915 (1978) (integration of previously segregated jobs resulted in opportunities for all workers to enter jobs previously restricted).

9/ EEOC, *Guidelines on Affirmative Action*, 44 Fed. Reg. 4422 (1979).

10/ *Wright* v. *National Archives & Records Service*, 609 F.2d 702 (4th Cir. 1979); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Also, Equal Employment Opportunity Coordinating Council, Policy Statement on Affirmative Action Programs for State and Local Government Agencies, 41 Fed. Reg. 38,814 (1976).

11/ *United Steelworkers of America* v. *Weber*, *supra*, at 208.

12/ 42 U.S.C. §2000e-6(a) (1964).

13/ 42 U.S.C. §2000e-6(c) as amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 107.

14/ 431 U.S. 324, 339 n.20 (1977).

15/ EEOC, *Guidelines on Affirmative Action*, *supra*.

16/ Elizabeth McTaggart Almquist, *Minorities, Gender and Work* (Lexington, Mass: D.C. Heath & Co., 1979), p.46.

17/ *Dred Scott* v. *Sanford*, 60 U.S. (19 How.) 393 (1857).

18/ Almquist, *Minorities, Gender and Work*, p.47.

19/ Daniel A. Novak, *The Wheel of Servitude: Black Forced Labor After Slavery* (The University Press of Kentucky, 1978), p.2.

20/ Herbert Hill, *Black Labor and the American Legal System* (Washington, D.C.: BNA, Inc., 1977), pp 11-12.

21/ *Id.*

22/ Almquist, *Minorities, Gender and Work*, p.47.

23/ *Id.*

24/ 163 U.S. 537 (1896).

25/ 347 U.S. 483 (1954).

26/ Almquist, *Minorities, Gender and Work*, p.48.

27/ The discriminatory conditions experienced by these minority groups have been documented in the following publications by the U.S. Commission on Civil Rights: The Navajo Nation: An American Colony (1975); The Southwest Indian Report (1973); The Forgotten Minority: Asian Americans in New York City (State Advisory Committee Report 1977); Success of Asian Americans: Fact or Fiction? (1980); Stranger in One's Land (1970); Toward Quality Education for Mexican Americans (1974); Puerto Ricans in the Continental United States: An Uncertain Future (1976).

28/ W. Chafe, Women and Equality: Changing Patterns in American Culture (New York: Oxford University Press, 1977).

29/ A. de Tocqueville, Democracy in America (J. Mayer ed., G. Lawrence trans., 1969), p. 341.

30/ A Consultation on Affirmative Action in the 1980's: Dismantling the Process of Discrimination; A Proposed Statement of the U.S. Commission on Civil Rights, Mar. 10-11, 1981, pp. 44-45 (statement of Joe R. Feagin).

31/ N.Y. Times, Mar. 30, 1980, at 21, col. 1.

32/ See generally, Women, Work, and Wages: Equal Pay for Jobs of Equal Value (Washington, D.C.: National Academy Press, 1981).

33/ Schmitt, "Social Situations Determinants of Interview Decisions," 29 Personnel Psychology 79 (1976).

34/ Schmitt and Coyle, "Applicant Decisions in the Employment Interview," 61 J. Applied Psychology 184 (1976).

35/ Joe R. Feagin and Clairece Booher Feagin, Discrimination American Style, Institutional Racism and Sexism (Englewood Cliffs, New Jersey: Prentice Hall, Inc., 1978), p. 53.

36/ Id.

37/ Benokraitis and J. Feagin, Affirmative Action and Equal Opportunity, Action, Inaction, Reaction (Boulder, Colorado: Westview Press, 1978), p. 81.

38/ Feagin and Feagin, Discrimination American Style, pp 46-49.

39/ Id.

40/ Id.

41/ Id.

42/ Id.

43/ Id. at pp. 54-55.

44/ Id. at p. 57.

45/ *Id.* at p. 59.

46/ *Teamsters* v. *U.S.*, *supra*, at 335 n. 15.

47/ 401 U.S. 424 (1971).

48/ *Id.*, at 431.

49/ "Employment and Earnings", Vol. 28, No. 1, p. 50, Jan. 1, 1981, U.S. Dept. of Labor, Bureau of Labor Statistics.

50/ Smith, "Youth Unemployment", 8 J. of Intergroup Relations 52 (1980-81).

51/ U.S. Dept. of Labor, Bureau of Labor Statistics, Unpublished Tabulations from the Current Population Survey, 1980 Annual Averages.

52/ Employee Information Report, (EEO-1), EEOC, 1966 and 1979.

53/ U.S. Dept. of Labor, Bureau of Labor Statistics, Unpublished Tabulations from the Current Population Survey, 1980 Annual Averages.

54/ Skelly Wright, "Color-Blind Theories and Color-Conscious Remedies", 47 U. Chi. L. Rev. 213 (1980).

55/ 42 U.S.C. §2000e-2(j).

56/ N.Y. Times, Feb. 19, 1979 at 12, col. 1.

57/ Wall St. J., Aug. 7, 1979 at 1, col. 5.

58/ Wall St. J., Apr. 3, 1979 at 1, col. 5.

59/ Joint comments of AFL-CIO, the United Steelworkers, the International Union of Electrical Workers, the United Autoworkers and the Coalition of Labor Union Women submitted on Feb. 2, 1980, to the Office of Federal Contract Compliance Programs on proposed changes to 41 C.F.R. Parts 60-1, 60-2, 60-20, 60-30, 60-50, 60-60, 60-250 and 60-741, published in the Federal Register on Dec. 28, 1979.

60/ Report by the Comptroller General of the United States, *Federal Paperwork--Its Impact on American Businesses*, U.S. General Accounting Office. GGD-79-4, Nov. 17, 1978, Appendices VIII and IX, pp. 21 and 23.

61/ Daily Labor Report, No. 86, p. A-4, May 5, 1981, U.S. Chamber of Commerce Statement of EEO Costs to Employers.

62/ *Cost of Government Regulation Study for Business Roundtable*, Appendix, pp. 4-6 and 4-10, Mar. 1979, Arthur Andersen and Co.

63/ *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 407 (1978).

Table 1. Comparison of 1966[1/] and 1979 EEO-1 Occupational Distributions for Total Workers and by Sex, U. S. Summary

Occupation (1)	Total, Both Sexes 1966[1/] (2)	Total, Both Sexes 1979 (3)	Total Men 1966[1/] (4)	Total Men 1979 (5)	Total Women 1966[1/] (6)	Total Women 1979 (7)
Total Number, All Jobs (In Thousands)	24,887	33,862	17,111	20,264	7,776	13,598
Percent Total, All Jobs	100.0	100.0	100.0	100.0	100.0	100.0
Officials	8.2	11.0	10.9	15.0	2.4	4.9
Professionals[1/]	6.6	8.8	7.7	9.5	4.2	7.9
Technicians[1/]	3.9	5.1	4.5	5.2	2.8	5.0
Sales	7.2	8.9	6.4	7.2	8.9	11.4
Office, Clerical	16.6	15.6	6.8	4.6	38.2	32.1
Craft	14.5	12.4	19.7	19.0	3.0	2.6
Operatives	26.0	21.1	27.4	23.8	23.1	17.1
Laborers	9.8	8.3	10.8	9.2	7.5	7.0
Service	7.5	8.6	6.2	6.5	10.3	11.8

[1/] To help assure conformity with 1979 data, professional and technical occupations cover 1967 rather than 1966.

Note: Due to rounding, individual entries may not sum to totals.

Source: Employer Information Reports (EEO-1).

Table 2. Comparison of 1966[1/] and 1979 EEO-1 Occupational Distributions for Men, by Selected Population Class, U. S. Summary

Occupation	Total, All Classes[2/]		White Men		Black Men		Hispanic Men	
	1966[1/]	1979	1966[1/]	1979	1966[1/]	1979	1966[1/]	1979
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Total Number, All Jobs (In Thousands)	24,887	33,862	15,165	16,724	1,421	2,124	436	1,082
Percent Total, All Jobs	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Officials	8.2	11.0	12.1	17.0	0.9	4.8	2.5	5.6
Professionals[1/]	6.6	8.8	8.5	10.5	0.8	2.6	2.2	3.3
Technicians[1/]	3.9	5.1	4.9	5.5	1.2	3.0	2.3	3.4
Sales	7.2	8.9	7.0	7.8	1.2	3.9	2.9	4.8
Office, Clerical	16.6	15.6	7.2	4.5	2.6	5.0	5.1	4.5
Craft	14.5	12.4	21.0	19.9	8.0	14.1	14.2	16.6
Operatives	26.0	21.1	26.3	22.1	38.0	35.5	32.5	29.5
Laborers	9.8	8.3	8.6	7.5	30.3	17.2	26.4	20.5
Service	7.5	8.6	5.0	5.2	17.1	13.9	12.0	11.9

[1/] To help assure conformity with 1979 data, professional and technical occupations cover 1967 rather than 1966.

[2/] Includes Asians, Pacific Islanders, American Indians and Alaskan Indians, not shown separately, and women.

Note: Due to rounding, individual entries may not sum to totals.

Source: Employer Information Reports (EEO-1).

Table 3. Comparison of 1966[1/] and 1979 EEO-1 Occupational Distributions for Women, by Selected Population Class, U. S. Summary

Occupation	Total, All Classes[2/]		White Women		Black Women		Hispanic Women	
	1966[1/]	1979	1966[1/]	1979	1966[1/]	1979	1966[1/]	1979
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Total Number, All Jobs (In Thousands)	24,887	33,862	6,925	10,843	609	1,808	195	678
Percent Total, All Jobs	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Officials	8.2	11.0	2.6	5.5	0.7	2.5	0.8	2.6
Professionals[1/]	6.6	8.8	4.4	8.7	2.3	3.6	1.6	2.8
Technicians[1/]	3.9	5.1	2.7	5.1	3.2	4.7	1.8	3.2
Sales	7.2	8.9	9.4	12.4	4.1	7.0	6.7	8.5
Office, Clerical	16.6	15.6	40.5	33.5	17.6	26.3	23.9	26.6
Craft	14.5	12.4	2.9	2.6	2.5	2.6	4.9	3.7
Operatives	26.0	21.1	22.6	15.6	26.1	23.3	30.5	24.4
Laborers	9.8	8.3	6.6	6.1	14.6	10.0	17.6	14.5
Service	7.5	8.6	8.6	10.4	29.0	20.0	12.1	13.7

[1/] To help assure conformity with 1979 data, professional and technical occupations cover 1967 rather than 1966.

[2/] Includes Asians, Pacific Islanders, American Indians and Alaskan Indians, not shown separately, and men.

Note: Due to rounding, individual entries may not sum to totals.

Source: Employer Information Reports (EEO-1).

APPENDIX B

(EEOC's Affirmative Action Guidelines)

federal register

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PART XI

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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AFFIRMATIVE ACTION GUIDELINES

Technical Amendments to the Procedural Regulations

[6570-06-M]

Title 29—Labor

CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PART 1608—AFFIRMATIVE ACTION APPROPRIATE UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED

Adoption of Interpretative Guidelines

AGENCY: Equal Employment Opportunity Commission.

ACTION: Adoption of final Guidelines on Affirmative Action appropriate under Title VII of the Civil Rights Act of 1964, as amended.

SUMMARY: The Equal Employment Opportunity Commission wishes to encourage voluntary action to eliminate employment discrimination, and hereby publishes its final Guidelines on Affirmative Action. Proposed Guidelines were published on December 28, 1977 (42 FR 64,826) for public comment. The Commission has now analyzed those comments and taken them into consideration in preparing its final Guidelines. The Preamble, below, describes the Commission's purpose for issuing these Guidelines and explains how the issues raised by the comments have been addressed. These Guidelines clarify the kinds of voluntary actions that are appropriate under Federal law. They describe the action the Commission will take when the procedures outlined herein have been followed. By elucidating the standards for voluntary action in these Guidelines, the Commission encourages affirmative action without resort to litigation.

EFFECTIVE DATE: February 20, 1979.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

AN OVERVIEW OF THE GUIDELINES ON AFFIRMATIVE ACTION

The Equal Employment Opportunity Commission ("EEOC", "the Commission") enforces Title VII of the Civil Rights Act of 1964, as amended, ("Title VII," "the Act"), which makes it illegal to discriminate in employment on the basis of race, color, religion, sex, or national origin. The Act requires the Commission to investigate complaints and attempt to correct violations it discovers, informally and through conciliation, or, if necessary, through court action. The Act also authorizes private individuals to bring lawsuits if their complaints are not resolved to their satisfaction or within the statutory time period.

Since the enactment of Title VII of the Civil Rights Act of 1964, many employers, labor organizations, and other persons subject to the Act have altered employment systems to implement the purposes of Title VII by improving employment opportunities for previously excluded groups. Because of what Congress has called the "complex and pervasive" nature of systemic discrimination against minorities and women (see H.R. Rep. No. 92-238, 92nd Cong., 2nd Sess. 8 (1972)), these voluntary efforts often involve significant changes in employment relationships. Some of these actions have been challenged under Title VII, as conflicting with statutory language requiring that employment decisions not be based on race, color, religion, sex, or national origin considerations. Accordingly, the Commission believes it is important to announce the legal principles which govern voluntary affirmative action under Title VII and other employment discrimination laws, so that persons subject to the Act have appropriate guidance. These Guidelines constitute the Commission's interpretation of Title VII, harmonizing the need to eliminate and prevent discrimination and to correct the effects of prior discrimination with the need to protect all individuals from discrimination on the basis of race, color, religion, sex, or national origin.

Requests for guidance have been received by the Commission from persons subject to Title VII concerning the relationship between affirmative action and so-called "reverse discrimination." There is no separate concept under Title VII of "reverse discrimination." Discrimination against all individuals because of race, color, religion, sex, or national origin is illegal under Title VII. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

To clarify the relationship between affirmative action and a countervailing claim of discrimination, a new section 1608.1 of these Guidelines sets forth the historical and legislative foundation for the Commission's interpretation of Title VII. Section 1608.1(b) explains that Congress enacted Title VII in order to overcome the effects of past and present employment practices which are part of a larger pattern of restriction, exclusion, discrimination, segregation and inferior treatment of minorities and women in many areas of life. Congress sought to accomplish this objective by establishing a national policy against discrimination in employment and encouraging voluntary affirmative action to eliminate barriers to equal employment opportunity. It is the Commission's interpretation that appropriate voluntary affirmative action, or affirmative action pursuant to an administrative or judicial requirement, does not constitute unlawful discrimination in violation of the Act.

It is essential to the effective implementation of Title VII that those who take appropriate voluntary affirmative action receive adequate protection against claims that their efforts constitute discrimination. The term affirmative action means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity. Section 1608.3 of these Guidelines identifies circumstances in which voluntary affirmative action is permissible under Title VII. When such circumstances exist, and a plan or program otherwise complies with these Guidelines, the Commission will find that there is no reasonable cause to believe that the affirmative action plan or program violates Title VII. See § 1608.10(a). In addition, § 1608.10(b) provides that where the plan or program is in writing and was adopted in good faith, in conformity with, and in reliance upon these Guidelines, the Commission will provide the protection authorized under section 713(b)(1) of Title VII to the employer, labor organization, or other person taking the action. See *EEOC v. AT&T*, 419 F. Supp. 1022, 1055, n. 34 (E.D.Pa. 1976), *aff'd*, 556 F.2d 167 (3rd Cir. 1977), *cert. denied*, 98 S.Ct. 3145 (1978).

On December 28, 1977, at 42 FR 64826 the Commission published proposed "Guidelines on Remedial and/or Affirmative Action" in the FEDERAL REGISTER and invited comments from the public. Comments were received from almost 500 individuals and organizations. The paragraphs below summarize the major issues raised by the comments and indicate the way in which the final Guidelines address the concerns raised by the comments.

On December 11, 1978, the Commission voted to approve the Guidelines in final form. Pursuant to Executive Order 12067, the Guidelines were then distributed to all Federal agencies for their review. Comments received in this process are also reflected in the discussion below.

I. CHANGE OF GUIDELINES' TITLE

The proposed Guidelines were titled "Proposed Guidelines on Affirmative and/or Remedial Action" and the phrase "remedial and/or affirmative action" was utilized throughout the document. A number of comments questioned the difference, if any, between remedial action and affirmative action. The term "remedial" has been dropped because of the possible erroneous implication that a violation of the law was required before affirmative action could be taken.

II. The Commission Will Process Complaints Alleging Discrimination Against Any Aggrieved Person

Many of the comments interpreted the Guidelines as indicating a Commission position that whites or males are entitled to less protection against discrimination than minorities or females, and that the Commission would either ignore complaints filed by whites or males, or process them in a different manner from those filed by females and minorities. The Commission maintains its position, articulated prior to *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), that discrimination on the basis of race, color, religion, sex, or national origin, is prohibited under Title VII, regardless of the individual or class against whom such discrimination is directed. See, e.g., Commission Decision No. 74-31, 7 FEP Cases 1326, 1328, CCH EEOC Decisions, ¶6404, (1973). The Commission will follow the same procedures in processing complaints filed by all individuals, regardless of their race, color, religion, sex, or national origin.

To avoid any ambiguity on these issues, language in the proposed Guidelines suggesting that complaints filed by whites and males would be "dismissed" under certain circumstances has been amended. Proposed paragraph V stated that the Commission would "issue a notice of dismissal of the charge" when an affirmative action program conformed to the Guidelines' requirements. The word "dismissal" is a term of art used by the Commission in its procedural regulations to refer to all determinations other than "reasonable cause." Because its use was misconstrued in many comments, final sections have been amended by substituting the phrase "a determination of no reasonable cause" where such a finding is justified by the facts of the case.

III. Consideration of Race, Color, Religion, Sex, and National Origin in Employment Decisions

Some commentators objected to the draft Guidelines because of their belief that Title VII requires that all employment decisions be made without consideration of race, color, religion, sex, or national origin, regardless of the circumstances. This conclusion does not comport with United States Supreme Court decisions interpreting Title VII, nor with the recent decision in *Regents of the University of California v. Bakke*, 98 S. Ct. 2733 (1978) (discussed infra). In the Title VII cases, the Supreme Court has called upon employers "'* * * to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in their country's history.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). See also, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Thus, the Supreme Court recognizes that persons subject to Title VII will consider race, sex and national origin in their analyses and evaluations. In addition, the Court has emphasized the concept of conciliation and voluntary action rather than litigation as the primary method of enforcing Title VII. See *Occidental Life Insurance Co. of California v. EEOC*, 432 U.S. 355 (1977). Voluntary action necessarily implies latitude to make a reasonable judgement as to whether action should be taken and the nature of such action.

At the same time, the Commission recognizes that considerations of race, color, religion, sex, and national origin are not permissible in other contexts. For example, in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), the Court held that the antidiscrimination principle of Title VII could be invoked by white employees as well as minority employees. No question of affirmative action was involved. The Court held that disparate treatment violated Title VII, but specifically stated that its decision did not address any issues relating to affirmative action programs. *McDonald, supra*, at 280, n. 8. For the reasons set forth in § 1608.1, the Commission considers that these Guidelines are consistent with the statute, the Congressional intent behind it, and the decisions of the Supreme Court.

IV. Two Different Justifications of Voluntary Action: The Relationship Between Title VII and Executive Order No. 11246, As Amended

A number of comments indicated uncertainty as to the relationship in the proposed Guidelines between the references to Title VII and the references to the Executive Order. These commentators apparently understood the Guidelines to mean that affirmative action required by Executive Order No. 11246, as amended, and its implementing regulations would be lawful under Title VII *only* where the contractor has a reasonable basis for concluding that such action is necessary under Title VII. The structure of the Guidelines has been changed to clarify the Commission's original interpretation that action taken pursuant to, and in conformity with the Executive order, as amended, and its implementing regulations, does not violate Title VII.

The legislative history of the Equal Employment Opportunity Act of 1972 shows that Congress repeatedly rejected limitations on affirmative action under the Executive Order, including the goals and timetables approach that had become by that time a central feature of the implementation of the Order. See, e.g., 118 Cong. Rec. 1385-1386 (1972) (remarks of Sen. Saxbe); 118 Cong. Rec. 1664-1665 (1972) (remarks of Sen. Javits); 118 Cong. Rec. 1676 (1972) (rejecting amendment offered by Sens. Allen and Ervin that would have prohibited requirements for certain types of affirmative action, including the goals approach, under the Executive Order); 118 Cong. Rec. 4918 (1972) (rejecting amendment offered by Sen. Ervin that would have applied section 703(j) of Title VII to the Executive Order).

The Commission concludes that Congress intended to permit the continuation of the Executive Order program which required affirmative action by government contractors. The Congress which acted to allow the Executive Order program to continue would not, in the same measure, invalidate it under Title VII. The statute should be construed to avoid such a contradictory conclusion, especially where such a conclusion would undermine the expressed Congressional purpose of opening employment opportunities to minorities and women who had in the past been denied such opportunities.

In the Equal Employment Opportunity Act of 1972, Congress recognized the contractor's right to rely on affirmative action plans that had been approved under the Executive Order. See section 718 of Title VII. Furthermore, Congress in section 715 established the Equal Employment Opportunity Coordinating Council (composed of the Secretary of Labor, the Chair of the EEOC, the Attorney General, the Chair of the U.S. Civil Service Commission, the Chair of the U.S. Commission on Civil Rights, or their respective delegates) "to minimize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among * * * branches of the Federal Government responsible for the implementation and enforcement of equal opportunity legislation, orders, and policies." 42 U.S.C. 2000e-14. This coordination responsibility now rests in the Commission by virtue of 5 U.S.C. 901 et seq., as applied by Reorganization Plan No. 1 (1978), which was implemented by Executive Order 12067 (43 FR 28,967, July 30, 1978). In order to achieve the objectives of section 715 and Executive Order No. 12067, the Commission concludes that it must recognize compliance with the requirements of Executive Order No. 11246, as amended, and its implementing regulations, as a defense to a charge that the affirmative action compliance program is discriminatory. The Commission concludes that adherence to an affirmative action compliance program approved by an appropriate official of the Department of Labor or its authorized agencies is lawful under Title VII. This interpretation thus insures that government contractors will not be subject to inconsistent standards by the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs.

Thus, the Commission recognizes that affirmative action by government contractors may be lawful under Title VII for either of two distinct reasons: (a) Such efforts constitute reasonable action to implement the legislative purposes of Title VII, or (b) the action was taken pursuant to, and in conformity with Executive Order No. 11246, as amended, and its implementing regulations. The Guidelines have been revised to reflect these two independent justifications for affirmative action under Title VII. A separate § 1608.5 governs affirmative action under Executive Order No. 11246, as amended.

The three step analytical process required under § 1608.4., when action is being justified under Title VII, is not necessary under § 1608.5, when action is being justified as undertaken pursuant to an approved program under Executive Order No. 11246, as amended. The circumstances in which such affirmative action is required under the Executive Order and the nature of such affirmative action are established by the Department of Labor.

V. Appropriate Steps for Taking Voluntary Action

A number of comments suggested that the Guidelines did not clearly define the steps the Commission believes are appropriate in taking voluntary affirmative action. A new § 1608.4 has been added to explain the three step process applicable to action justified under Title VII: reasonable self analysis, reasonable basis for concluding that action is appropriate, and reasonable action to correct that situation. The process set forth in § 1608.4 should be utilized to determine whether the circumstances set forth in § 1608.3 are present. Section 1608.5 covers action pursuant to Executive Order No. 11246, as amended.

VI. Reasonable Self Analysis

Some commentators requested further elaboration on the meaning of the term "self analysis." Section 1608.4(a) has been amended to make it clear that there is no single mandatory method of conducting the self analysis, and to refer to the methodology used by government contractors under Revised Order 4 as a model which employers and others may use in conducting a self analysis. Whatever method is used, the primary objective must be to determine whether the employment practices operate as barriers to equal employment opportunity.

Some commentators suggested that the Guidelines may be subject to abuse unless the self analysis is required to be in writing. The Commission believes that the protection from Title VII liability which may be available under section 713(b)(1) should only be recognized where the affirmative action plan or program has been carefully and consciously developed. Accordingly, the section 713(b)(1) defense will be recognized by the Commission only where the analysis and the affirmative action plan or program are in writing and are adopted in good faith, in conformity with, and in reliance upon these Guidelines. See §§ 1608.4(d) and 1608.10.

However, a respondent who has undertaken the analysis, self-evaluation, and development of an affirmative action plan of the type described in the Guidelines, but has not reduced the analysis and plan to writing, may assert these facts as a defense to a charge of discrimination. The analysis and plan need not be in writing because the Commission does not generally require that employer defenses be based on written documents. However, employers are encouraged to have written documentation since such written evidence would make it easier to establish that an analysis was conducted and that a plan or program exists. See § 1608.4(d)(2).

In response to comments which expressed concern that adoption of a plan or program might constitute an admission of discrimination, § 1608.4(d)(1) makes it clear that it is not necessary to state in writing the conclusion that a Title VII violation exists.

VII. The Guidelines Do Not Approve Inadequate Remedies

A number of commentators were concerned that violators of the Act could use the Guidelines and the section 713(b)(1) defense to shield themselves from liability for the underlying discrimination inadequately addressed by an affirmative action plan or program. The Guidelines do not lend themselves to this interpretation.

The proposed Guidelines stated in paragraph VII that the Guidelines were not intended to provide standards for determining whether voluntary action had fully remedied discrimination. The analysis and plan contemplated by these Guidelines will not establish whether discrimination existed before the plan was adopted. Furthermore, the plan cannot determine whether discrimination might take place subsequent to its adoption. In addition, the judgment as to whether affirmative action is sufficient to eliminate discrimination is a complex one which may take into account circumstances that may not have been included in the analysis which underlies the affirmative action plan. For these reasons the existence of the plan cannot provide the basis for determining whether discrimination existed, or whether the plan itself provided an adequate remedy for such discrimination. Therefore, the Guidelines state that they do not apply to a determination of the adequacy of an affirmative action plan to eliminate discrimination against previously excluded groups. Furthermore, the section 713(b)(1) defense is not involved in a determination of the adequacy of such a plan or program. Section 1608.11(a) is intended to make it clear that employers, labor organizations, or other persons who take affirmative action may still be liable under Title VII if the plan or program does not adequately remedy illegal discrimination.

VIII. No Admission of Discrimination Required

Another group of comments stated that, because the Guidelines do not require an admission or finding of discrimination, the Commission may thereby approve affirmative action which might constitute unlawful discrimination prohibited by Title VII. This interpretation is incorrect.

The proposed Guidelines stated in paragraph II that the lawfulness of affirmative action was not "dependent upon an admission, or a finding, or evidence sufficient to prove" that the person taking such action had actually violated Title VII. After careful analysis and consideration, the Commission is of the opinion that the statement, as amended, appearing in § 1608.4(b), represents an appropriate interpretation of Federal law and policy for the reasons set forth in § 1608.1(c).

These Guidelines provide a sufficient basis to determine whether affirmative action is appropriate. Persons subject to the Act should not, by taking reasonable affirmative action, be exposed to liability under the very Act they are seeking to implement. Similarly, the law should not force the employer or other person to speculate whether an arguable defense to a Title VII charge would be recognized by a court before taking affirmative action. Section 1608.4(b) makes it clear that this reasonable basis exists without regard to arguable defenses to a Title VII action.

IX. THE SCOPE OF APPROPRIATE VOLUNTARY ACTION

Several comments raised questions concerning the appropriate scope of voluntary affirmative action intended by the Guidelines. Some perceive the Commission's use of the words "ratios and other numerical remedies" in proposed Paragraph IV, in addition to the words "goals and timetables", as indicating that the Commission was endorsing "absolute quotas" or "fixed quotas" without regard to qualifications or the circumstances in which they were used. The words "ratios and other numerical remedies" have been omitted from these Guidelines in order to avoid ambiguity and to make it clear that any numerical objective is subject to the availability of sufficient applicants who are qualified by proper, validated standards.

Affirmative Action under these Guidelines must be reasonable and must be related to the problems disclosed by the self-analysis. A new § 1608.4(c) has been added to make this clear. Affirmative action under these Guidelines may include interim goals or targets. Such interim goals or targets for previously excluded groups may be higher than the percentage of their availability in the workforce so that the long term goal may be met in a reasonable period of time. In order to achieve such interim goals or targets, an employer may consider race, sex, and/or national origin in making selections from among qualified or qualifiable applicants. Courts have ordered actions of this kind in litigated cases and in consent decrees. *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1972), *en banc, cert. denied* 98 S. Ct. 3145 (1978); *U.S.* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

X. RELEVANCE OF CERTAIN COURT CASES

A number of comments indicated that there were court decisions rendering inappropriate the approach taken by the Commission in these Guidelines. Because the proposed Guidelines were issued for comment prior to the decision of the United States Supreme Court in the case of *Regents of University of California* v. *Bakke*, 98 S. Ct. 2733 (1978), a number of commentators suggested that either the Guidelines were inappropriate in light of the decision of the California Supreme Court in that case, or that the Commission should wait until the U.S. Supreme Court had issued its opinion. As recommended, the Commission awaited the action of the Supreme Court in that case before promulgating these Guidelines. The Commission has reviewed these Guidelines in light of the opinions of the Justices of the Supreme Court in *Bakke*. The Commission concludes that these Guidelines are consistent with the action of the Supreme Court in that case.

In the *Bakke* case the university did not assert reliance on any detailed guidance and procedures for crafting an affirmative action plan. These Guidelines seek to provide such guidance and thereby to establish an appropriate legal foundation for voluntary action under Title VII.

Perhaps the case most frequently cited by the commentators as conflicting with the principles articulated in the proposed Guidelines was a split decision in *Weber* v. *Kaiser Aluminum Corp.*, 563 F.2d 216 (5th Cir. 1977), *cert. granted*, —— U.S. ——. *Weber*, however, was decided prior to *Bakke*, and therefore did not take into account the opinions in that case. In addition, it is fundamentally unfair to expose those subject to Executive Order No. 11246 to risks of liability under Title VII when they act in compliance with government requirements or when they act voluntarily and appropriately to achieve statutory objectives. Furthermore, the clarification provided by these Guidelines is necessary because the *Weber* decision may be interpreted to unduly interfere with the range of affirmative action which Congress intended to permit under Title VII.[1]

The Commission has examined all the decisions brought to its attention in the comments and other recent decisions of the United States Supreme Court and concludes that none of these decisions affect its interpretation of the circumstances in which affirmative action is lawful under Title VII.

By virtue of the authority vested in it by section 713 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12, 78 Stat. 265, and after due consideration of all comments received, the Equal Employment Opportunity Commission hereby issues as new Part 1608 of Title 29 of the Code of Federal Regulations its "Guidelines on Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as Amended" as set forth below.

Signed at Washington, D.C., this 16th day of January 1979.

For the Commission.

ELEANOR HOLMES NORTON,
Chair.

Sec.
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AUTHORITY: Sec. 713 of title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12, 78 Stat. 265.

§ 1608.1 Statement of Purpose.

(a) *Need for Guidelines.* Since the passage of Title VII in 1964, many employers, labor organizations, and other persons subject to Title VII have changed their employment practices and systems to improve employment opportunities for minorities and women, and this must continue. These changes have been undertaken either on the initiative of the employer, labor organization, or other person subject to Title VII, or as a result of conciliation efforts under Title VII, action under Executive Order No. 11246, as amended, or under other Federal, state, or local laws, or litigation. Many decisions taken pursuant to affirmative action plans or programs have been race, sex, or national origin conscious in order to achieve the Congressional purpose of providing equal employment opportunity. Occasionally, these actions have been challenged as inconsistent with Title VII, because they took into account race, sex, or national origin. This is the so-called "reverse discrimination" claim. In such a situation, both the affirmative action undertaken to improve the conditions of minorities and women, and the objection to that action, are based upon the principles of Title VII. Any uncertainty as to the meaning and application of Title VII in such situations threatens the accomplishment of the clear Congressional intent to encourage voluntary affirmative action. The Commission believes that by the enactment of Title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement. Such a result would immobilize or reduce the efforts of many who would otherwise take action to improve the opportunities of minorities and women without litigation, thus frustrating the Congressional intent to encourage voluntary action and increasing the prospect of Title VII litigation. The Commission believes that it is now necessary to clarify and harmonize the principles of Title VII in order to achieve these Congressional objectives and protect those employers, labor organizations, and other persons who comply with the principles of Title VII.

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[1] The Commission has taken the position that the decision of the Court of Appeals is incorrect and that the affirmative action program there was lawful. The Solicitor General has taken the same position, and the Supreme Court has now granted petitions for a writ of certiorari.

(b) *Purposes of Title VII.* Congress enacted Title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life.[1] The Legislative Histories of Title VII, the Equal Pay Act, and the Equal Employment Opportunity Act of 1972 contain extensive analyses of the higher unemployment rate, the lesser occupational status, and the consequent lower income levels of minorities and women.[2] The purpose of Executive Order No. 11246, as amended, is similar to the purpose of Title VII. In response to these economic and social conditions, Congress, by passage of Title VII, established a national policy against discrimination in employment on grounds of race, color, religion, sex, and national origin. In addition, Congress strongly encouraged employers, labor organizations, and other persons subject to Title VII (hereinafter referred to as "persons," see section 701(a) of the Act) to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action. Conference, conciliation, and persuasion were the primary processes adopted by Congress in 1964, and reaffirmed in 1972, to achieve these objectives, with enforcement action through the courts or agencies as a supporting procedure where voluntary action did not take place and conciliation failed. See § 706 of Title VII.

(c) *Interpretation in furtherance of legislative purpose.* The principle of nondiscrimination in employment because of race, color, religion, sex, or national origin, and the principle that each person subject to Title VII should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation, are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of Title VII. Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII.[3] Affirmative action under these principles means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity. Such voluntary affirmative action cannot be measured by the standard of whether it would have been required had there been litigation, for this standard would undermine the legislative purpose of first encouraging voluntary action without litigation. Rather, persons subject to Title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of Title VII. Correspondingly, Title VII must be construed to permit such voluntary action, and those taking such action should be afforded the protection against Title VII liability which the Commission is authorized to provide under section 713(b)(1).

(d) *Guidelines interpret Title VII and authorize use of Section 713(b)(1).* These Guidelines describe the circumstances in which persons subject to Title VII may take or agree upon action to improve employment opportunities of minorities and women, and describe the kinds of actions they may take which are consistent with Title VII. These Guidelines constitute the Commission's interpretation of Title VII and will be applied in the processing of claims of discrimination which involve voluntary affirmative action plans and programs. In addition, these Guidelines state the circumstances under which the Commission will recognize that a person subject to Title VII is entitled to assert that actions were taken "in good faith, in conformity with, and in reliance upon a written interpretation or opinion of the Commission," including reliance upon the interpretation and opinion contained in these Guidelines, and thereby invoke the protection of section 713(b)(1) of Title VII.

(e) *Review of existing plans recommended.* Only affirmative action plans or programs adopted in good faith, in conformity with, and in reliance upon these Guidelines can receive the full protection of these Guidelines, including the section 713(b)(1) defense. See § 1608.10. Therefore, persons subject to Title VII who have existing affirmative action plans, programs, or agreements are encouraged to review them in light of these Guidelines, to modify them to the extent necessary to comply with these Guidelines, and to readopt or reaffirm them.

§ 1608.2 Written interpretation and opinion.

These Guidelines constitute "a written interpretation and opinion" of the Equal Employment Opportunity Commission as that term is used in section 713(b)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-12(b)(1), and section 1601.33 of the Procedural Regulations of the Equal Employment Opportunity Commission (29 CFR 1601.30; 42 FR 55,394 (October 14, 1977)). Section 713(b)(1) provides:

> In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission * * *. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that * * * after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect * * *.

The applicability of these Guidelines is subject to the limitations on use set forth in § 1608.11.

§ 1608.3 Circumstances under which voluntary affirmative action is appropriate.

(a) *Adverse effect.* Title VII prohibits practices, procedures, or policies which have an adverse impact unless they are justified by business necessity. In addition, Title VII proscribes practices which "tend to deprive" persons of equal employment opportunities. Employers, labor organizations and other persons subject to Title VII may take affirmative action based on an analysis which reveals facts constituting actual or potential adverse impact, if such adverse impact is likely to result from existing or contemplated practices.

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[1] Congress has also addressed these conditions in other laws, including the Equal Pay Act of 1963, Pub. L. 88-38, 77 Stat. 56 (1963), as amended; the other Titles of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964), as amended; the Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (1965), as amended; the Fair Housing Act of 1968, Pub. L. 90-284, Title VIII, 82 Stat. 73, 81 (1968), as amended; the Educational Opportunity Act (Title IX), Pub. L. 92-318, 86 Stat. 373 (1972), as amended; and the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972), as amended.

[2] Equal Pay Act of 1963: S. Rep. No. 176, 88th Cong., 1st Sess., 1-2 (1963). Civil Rights Act of 1964: H.R. Rep. No. 914, pt. 2, 88th Cong., 1st Sess. (1971). Equal Employment Opportunity Act of 1972: H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971). See also, Equal Employment Opportunity Commission, *Equal Employment Opportunity Report—1975, Job Patterns for Women in Private Industry* (1977); Equal Employment Opportunity Commission, *Minorities and Women in State and Local Government—1975* (1977); United States Commission on Civil Rights, *Social Indicators of Equality for Minorities and Women* (1978).

[3] Affirmative action often improves opportunities for all members of the workforce, as where affirmative action includes the posting of notices of job vacancies. Similarly, the integration of previously segregated jobs means that all workers will be provided opportunities to enter jobs previously restricted. See, e.g., *EEOC v. AT&T*, 419 F. Supp. 1022 (E.D.Pa. 1976), *aff'd*, 556 F. 2d 167 (3rd Cir. 1977), *cert. denied*, 98 S.Ct. 3145 (1978).

(b) *Effects of prior discriminatory practices.* Employers, labor organizations, or other persons subject to Title VII may also take affirmative action to correct the effects of prior discriminatory practices. The effects of prior discriminatory practices can be initially identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labor force.

(c) *Limited labor pool.* Because of historic restrictions by employers, labor organizations, and others, there are circumstances in which the available pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited. Employers, labor organizations, and other persons subject to Title VII may, and are encouraged to take affirmative action in such circumstances, including, but not limited to, the following:

(1) Training plans and programs, including on-the-job training, which emphasize providing minorities and women with the opportunity, skill, and experience necessary to perform the functions of skilled trades, crafts, or professions;

(2) Extensive and focused recruiting activity;

(3) Elimination of the adverse impact caused by unvalidated selection criteria (see sections 3 and 6, Uniform Guidelines on Employee Selection Procedures (1978), 43 FR 30,290; 38,297; 38,299 (August 25, 1978));

(4) Modification through collective bargaining where a labor organization represents employees, or unilaterally where one does not, of promotion and layoff procedures.

§ 1608.4 Establishing affirmative action plans.

An affirmative action plan or program under this section shall contain three elements: a reasonable self analysis; a reasonable basis for concluding action is appropriate; and reasonable action.

(a) *Reasonable self analysis.* The objective of a self analysis is to determine whether employment practices do, or tend to, exclude, disadvantage, restrict, or result in adverse impact or disparate treatment of previously excluded or restricted groups or leave uncorrected the effects of prior discrimination, and if so, to attempt to determine why. There is no mandatory method of conducting a self analysis. The employer may utilize techniques used in order to comply with Executive Order No. 11246, as amended, and its implementing regulations, including 41 CFR Part 60-2 (known as Revised Order 4), or related orders issued by the Office of Federal Contract Compliance Programs or its authorized agencies, or may use an analysis similar to that required under other Federal, state, or local laws or regulations prohibiting employment discrimination. In conducting a self analysis, the employer, labor organization, or other person subject to Title VII should be concerned with the effect on its employment practices of circumstances which may be the result of discrimination by other persons or institutions. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

(b) *Reasonable basis.* If the self analysis shows that one or more employment practices: (1) Have or tend to have an adverse effect on employment opportunities of members of previously excluded groups, or groups whose employment or promotional opportunities have been artificially limited, (2) leave uncorrected the effects of prior discrimination, or (3) result in disparate treatment, the person making the self analysis has a reasonable basis for concluding that action is appropriate. It is not necessary that the self analysis establish a violation of Title VII. This reasonable basis exists without any admission or formal finding that the person has violated Title VII, and without regard to whether there exists arguable defenses to a Title VII action.

(c) *Reasonable action.* The action taken pursuant to an affirmative action plan or program must be reasonable in relation to the problems disclosed by the self analysis. Such reasonable action may include goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees. It may include the adoption of practices which will eliminate the actual or potential adverse impact, disparate treatment, or effect or past discrimination by providing opportunities for members of groups which have been excluded, regardless of whether the persons benefited were themselves the victims of prior policies or procedures which produced the adverse impact or disparate treatment or which perpetuated past discrimination.

(1) *Illustrations of appropriate affirmative action.* Affirmative action plans or programs may include, but are not limited to, those described in the Equal Employment Opportunity Coordinating Council "Policy Statement on Affirmative Action Programs for State and Local Government Agencies," 41 FR 38,814 (September 13, 1976), reaffirmed and extended to all persons subject to Federal equal employment opportunity laws and orders, in the Uniform Guidelines on Employee Selection Procedures (1978) 43 FR 38,290; 38,300 (Aug. 25, 1978). That statement reads, in relevant part:

> When an employer has reason to believe that its selection procedures have * * * exclusionary effect * * *, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex or ethnic 'conscious,' include, but are not limited to, the following:
>
> The establishment of a long term goal and short range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;
>
> A recruitment program designed to attract qualified members of the group in question;
>
> A systematic effort to organize work and re-design jobs in ways that provide opportunities for persons lacking 'journeyman' level knowledge or skills to enter and, with appropriate training, to progress in a career field;
>
> Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;
>
> The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;
>
> A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and
>
> The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(2) *Standards of reasonable action.* In considering the reasonableness of a particular affirmative action plan or program, the Commission will generally apply the following standards:

(i) The plan should be tailored to solve the problems which were identified in the self analysis, see § 1608.4(a), supra, and to ensure that employment systems operate fairly in the future, while avoiding unnecessary restrictions on opportunities for the workforce as a whole. The race, sex, and national origin conscious provisions of the plan or program should be maintained only so long as is necessary to achieve these objectives.

(ii) Goals and timetables should be reasonably related to such considerations as the effects of past discrimination, the need for prompt elimination of adverse impact or disparate treatment, the availability of basically qualified or qualifiable applicants, and the number of employment opportunities expected to be available.

(d) *Written or unwritten plans or programs*—(1) *Written plans required for 713(b)(1) Protection.* The protection of section 713(b) of Title VII will be accorded by the Commission to a person subject to Title VII only if the self analysis and the affirmative action plan are dated and in writing, and the plan otherwise meets the requirements of Section 713(b)(1). The Commission will not require that there be any written statement concluding that a Title VII violation exists.

(2) *Reasonable cause determinations.* Where an affirmative action plan or program is alleged to violate Title VII, or is asserted as a defense to a charge of discrimination, the Commission will investigate the charge in accordance with its usual procedures and pursuant to the standards set forth in these Guidelines, whether or not the analysis and plan are in writing. However, the absence of a written self analysis and a written affirmative action plan or program may make it more difficult to provide credible evidence that the analysis was conducted, and that action was taken pursuant to a plan or program based on the analysis. Therefore, the Commission recommends that such analyses and plans be in writing.

§ 1608.5 Affirmative action compliance programs under Executive Order No. 11246, as amended.

Under Title VII, affirmative action compliance programs adopted pursuant to Executive Order No. 11246, as amended, and its implementing regulations, including 41 CFR Part 60-2 (Revised Order 4), will be considered by the Commission in light of the similar purposes of Title VII and the Executive Order, and the Commission's responsibility under Executive Order No. 12067 to avoid potential conflict among Federal equal employment opportunity programs. Accordingly, the Commission will process Title VII complaints involving such affirmative action compliance programs under this section.

(a) *Procedures for review of Affirmative Action Compliance Programs.* If adherence to an affirmative action compliance program adopted pursuant to Executive Order No. 11246, as amended, and its implementing regulations, is the basis of a complaint filed under Title VII, or is alleged to be the justification for an action which is challenged under Title VII, the Commission will investigate to determine: (1) Whether the affirmative action compliance program was adopted by a person subject to the Order and pursuant to the Order, and (2) whether adherence to the program was the basis of the complaint or the justification.

(1) *Programs previously approved.* If the Commission makes the determination described in paragraph (a) of this section and also finds that the affirmative action program has been approved by an appropriate official of the Department of Labor or its authorized agencies, or is part of a conciliation or settlement agreement or an order of an administrative agency, whether entered by consent or after contested proceedings brought to enforce Executive Order No. 11246, as amended, the Commission will issue a determination of no reasonable cause.

(2) *Program not previously approved.* If the Commission makes the determination described in paragraph (a), of this section but the program has not been approved by an appropriate official of the Department of Labor or its authorized agencies, the Commission will: (i) Follow the procedure in § 1608.10(a) and review the program, or (ii) refer the plan to the Department of Labor for a determination of whether it is to be approved under Executive Order No. 11246, as amended, and its implementing regulations. If, the Commission finds that the program does conform to these Guidelines, or the Department of Labor approves the affirmative action compliance program, the Commission will issue a determination of no reasonable cause under § 1608.10(a).

(b) *Reliance on these guidelines.* In addition, if the affirmative action compliance program has been adopted in good faith reliance on these Guidelines, the provisions of section 713(b)(1) of Title VII and of § 1608.10(b), below, may be asserted by the contractor.

§ 1608.6 Affirmative action plans which are part of Commission conciliation or settlement agreements.

(a) *Procedures for review of plans.* If adherence to a conciliation or settlement agreement executed under Title VII and approved by a responsible official of the EEOC is the basis of a complaint filed under Title VII, or is alleged to be the justification for an action challenged under Title VII, the Commission will investigate to determine: (1) Whether the conciliation agreement or settlement agreement was approved by a responsible official of the EEOC, and (2) whether adherence to the agreement was the basis for the complaint or justification. If the Commission so finds, it will make a determination of no reasonable cause under § 1608.10(a) and will advise the respondent of its right under section 713(b)(1) of Title VII to rely on the conciliation agreement.

(b) *Reliance on these guidelines.* In addition, if the affirmative action plan or program has been adopted in good faith reliance on these Guidelines, the provisions of section 713(b)(1) of Title VII and of § 1608.10(b), below, may be asserted by the respondent.

§ 1608.7 Affirmative action plans or programs under State or local law.

Affirmative action plans or programs executed by agreement with state or local government agencies, or by order of state or local government agencies, whether entered by consent or after contested proceedings, under statutes or ordinances described in Title VII, will be reviewed by the Commission in light of the similar purposes of Title VII and such statutes and ordinances. Accordingly, the Commission will process Title VII complaints involving such affirmative action plans or programs under this section.

(a) *Procedures for review of plans or programs.* If adherence to an affirmative action plan or program executed pursuant to a state statute or local ordinance described in Title VII is the basis of a complaint filed under Title VII or is alleged to be the justification for an action which is challenged under Title VII, the Commission will investigate to determine: (1) Whether the affirmative action plan or program was executed by an employer, labor organization, or person subject to the statute or ordinance, (2) whether the agreement was approved by an appropriate official of the state or local government, and (3) whether adherence to the plan or program was the basis of the complaint or justification.

(1) *Previously Approved Plans or Programs.* If the Commission finds the facts described in paragraph (a) of this section, the Commission will, in accordance with the "substantial weight" provisions of section 706 of the Act, find no reasonable cause where appropriate.

(2) *Plans or Programs not previously approved.* If the plan or program has not been approved by an appropriate official of the state or local government, the Commission will follow the procedure of § 1608.10 of these Guidelines. If the Commission finds that the plan or program does conform to these Guidelines, the Commission will make a determination of no reasonable cause as set forth in § 1608.10(a).

(b) *Reliance on these guidelines.* In addition, if the affirmative action plan or program has been adopted in good faith reliance on these Guidelines, the provisions of section 713(b)(1) and § 1608.10(b), below, may be asserted by the respondent.

§ 1608.8 Adherence to court order.

Parties are entitled to rely on orders of courts of competent jurisdiction. If adherence to an Order of a United States District Court or other court of competent jurisdiction, whether entered by consent or after contested litigation, in a case brought to enforce a Federal, state, or local equal employment opportunity law or regulation, is the basis of a complaint filed under Title VII or is alleged to be the justification for an action which is challenged under Title VII, the Commission will investigate to determine: (a) Whether such an Order exists and (b) whether adherence to the affirmative action plan which is part of the Order was the basis of the complaint or justification. If the Commission so finds, it will issue a determination of no reasonable cause. The Commission interprets Title VII to mean that actions taken pursuant to the direction of a Court Order cannot give rise to liability under Title VII.

§ 1608.9 Reliance on directions of other government agencies.

When a charge challenges an affirmative action plan or program, or when such a plan or program is raised as justification for an employment decision, and when the plan or program was developed pursuant to the requirements of a Federal or state law or regulation which in part seeks to ensure equal employment opportunity, the Commission will process the charge in accordance with § 1608.10(a). Other agencies with equal employment opportunity responsibilities may apply the principles of these Guidelines in the exercise of their authority.

§ 1608.10 Standard of review.

(a) *Affirmative action plans or programs not specifically relying on these guidelines.* If, during the investigation of a charge of discrimination filed with the Commission, a respondent asserts that the action complained of was taken pursuant to an in accordance with a plan or program of the type described in these Guidelines, the Commission will determine whether the assertion is true, and if so, whether such a plan or program conforms to the requirements of these guidelines. If the Commission so finds, it will issue a determination of no reasonable cause and, where appropriate, will state that the determination constitutes a written interpretation or opinion of the Commission under section 713(b)(1). This interpretation may be relied upon by the respondent and asserted as a defense in the event that new charges involving similar facts and circumstances are thereafter filed against the respondent, which are based on actions taken pursuant to the affirmative action plan or program. If the Commission does not so find, it will proceed with the investigation in the usual manner.

(b) *Reliance on these guidelines.* If a respondent asserts that the action taken was pursuant to and in accordance with a plan or program which was adopted or implemented in good faith, in conformity with, and in reliance upon these Guidelines, and the self analysis and plan are in writing, the Commission will determine whether such assertion is true. If the Commission so finds, it will so state in the determination of no reasonable cause and will advise the respondent that:

(1) The Commission has found that the respondent is entitled to the protection of section 713(b)(1) of Title VII; and

(2) That the determination is itself an additional written interpretation or opinion of the Commission pursuant to section 713(b)(1).

§ 1608.11 Limitations on the application of these guidelines.

(a) *No determination of adequacy of plan or program.* These Guidelines are applicable only with respect to the circumstances described in § 1608.1(d), above. They do not apply to, and the section 713(b)(1) defense is not available for the purpose of, determining the adequacy of an affirmative action plan or program to eliminate discrimination. Whether an employer who takes such affirmative action has done enough to remedy such discrimination will remain a question of fact in each case.

(b) *Guidelines inapplicable in absence of affirmative action.* Where an affirmative action plan or program does not exist, or where the plan or program is not the basis of the action complained of, these Guidelines are inapplicable.

(c) *Currency of plan or program.* Under section 713(b)(1), persons may rely on the plan or program only during the time when it is current. Currency is related to such factors as progress in correcting the conditions disclosed by the self analysis. The currency of the plan or program is a question of fact to be determined on a case by case basis. Programs developed under Executive Order No. 11246, as amended, will be deemed current in accordance with Department of Labor regulations at 41 CFR Chapter 60, or successor orders or regulations.

§ 1608.12 Equal employment opportunity plans adopted pursuant to section 717 of Title VII.

If adherence to an Equal Employment Opportunity Plan, adopted pursuant to Section 717 of Title VII, and approved by an appropriate official of the U.S. Civil Service Commission, is the basis of a complaint filed under Title VII, or is alleged to be the justification for an action under Title VII, these Guidelines will apply in a manner similar to that set forth in § 1608.5. The Commission will issue regulations setting forth the procedure for processing such complaints.

[FR Doc. 79-2025 Filed 1-18-79; 8:45 am]

[6570-06-M]

PART 1601—PROCEDURAL REGULATIONS

Issuance of Interpretation and Opinion

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final rule.

SUMMARY: The Commission is today publishing in final form a set of Guidelines on Affirmative Action (44 FR 4422), to encourage voluntary action to eliminate employment discrimination. Section 1601.33 of the Commission's regulations is being amended to reflect a new method, contemplated by these Guidelines, by which the Commission may issue an "interpretation of opinion" of the Commission within the meaning of Section 713 of Title VII of the Civil Rights Act of 1964, as amended.

EFFECTIVE DATE: February 20, 1979.

FOR FURTHER INFORMATION CONTACT:

Peter C. Robertson, Director, Office of Policy Implementation, 2401 E Street, NW., Room 4002A, Washington, D.C. 20506 (202) 254-7639.

SUPPLEMENTARY INFORMATION: The Commission's new Guidelines on Affirmative Action contemplate that in instances where a charge of discrimination has been filed and the Commission finds that the treatment complained of occurred as a result of affirmative action procedures consistent with its Guidelines on Affirmative Action, the Commission will issue a determination of no reasonable cause. This determination may contain language stating that it is "a written interpretation or opinion of the Commission" within the meaning of Section 713(b)(1) of Title VII of the Civil Rights Act of 1964, as amended. The respondent in such a case may rely upon this determination as a defense to any subsequent complaints of discrimination which involve similar facts and circumstances, if the subsequent actions complained of were also taken by the respondent under its affirmative action procedures.

Such language will also appear in no-cause determinations whenever the Commission finds that the action complained of occurred pursuant to an affirmative action plan adopted in good faith compliance with, and reliance upon, the Commission's Guidelines on affirmative Action.

The Commission's procedural regulations are accordingly revised to include this specific type of no-cause finding as a type of "written interpretation or opinion of the Commission."

Signed at Washington, D.C. this 16th day of January 1979.

For the Commission.

ELEANOR HOLMES NORTON,
Chair.

Therefore, 29 CFR 1601.33 is amended to read as follows:

§ 1601.33 Issuance of interpretation or opinion.

Only the following may be relied upon as a "written interpretation or opinion of the Commission" within the meaning of Section 713 of Title VII:

(a) A letter entitled "opinion letter" and signed by the General Counsel on behalf of the Commission, or

(b) Matter published and specifically designated as such in the FEDERAL REGISTER, including the Commission's Guidelines on Affirmative Action, or

(c) A Commission determination of no reasonable cause, issued under the circumstances described in § 1608.10 (a) or (b) of the Commission's Guidelines on Affirmative Action 29 CFR Part 1608, when such determination contains a statement that it is a "written interpretation or opinion of the Commission."

[FR Doc. 79-2026 Filed 1-18-79; 8:45 am]

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APPENDIX C

(Executive Order 12067)

[3195-01]

Executive Order 12067

June 30, 1978

Providing for Coordination of Federal Equal Employment Opportunity Programs

By virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, including Section 9 of Reorganization Plan Number 1 of 1978 (43 FR 19807), it is ordered as follows:

1-1. *Implementation of Reorganization Plan.*

1-101. The transfer to the Equal Employment Opportunity Commission of all the functions of the Equal Employment Opportunity Coordinating Council, and the termination of that Council, as provided by Section 6 of Reorganization Plan Number 1 of 1978 (43 FR 19807), shall be effective on July 1, 1978.

1-2. *Responsibilities of Equal Employment Opportunity Commission.*

1-201. The Equal Employment Opportunity Commission shall provide leadership and coordination to the efforts of Federal departments and agencies to enforce all Federal statutes, Executive orders, regulations, and policies which require equal employment opportunity without regard to race, color, religion, sex, national origin, age or handicap. It shall strive to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the Federal departments and agencies having responsibility for enforcing such statutes, Executive orders, regulations and policies.

1-202. In carrying out its functions under this order the Equal Employment Opportunity Commission shall consult with and utilize the special expertise of Federal departments and agencies with equal employment opportunity responsibilities. The Equal Employment Opportunity Commission shall cooperate with such departments and agencies in the discharge of their equal employment responsibilities.

1-203. All Federal departments and agencies shall cooperate with and assist the Equal Employment Opportunity Commission in the performance of its functions under this order and shall furnish the Commission such reports and information as it may request.

1-3. *Specific Responsibilities.*

1-301. To implement its responsibilities under Section 1-2, the Equal Employment Opportunity Commission shall, where feasible:

(a) develop uniform standards, guidelines, and policies defining the nature of employment discrimination on the ground of race, color, religion, sex, national origin, age or handicap under all Federal statutes, Executive orders, regulations, and policies which require equal employment opportunity;

(b) develop uniform standards and procedures for investigations and compliance reviews to be conducted by Federal departments and agencies under any Federal statute, Executive order, regulation or policy requiring equal employment opportunity;

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(c) develop procedures with the affected agencies, including the use of memoranda of understanding, to minimize duplicative investigations or compliance reviews of particular employers or classes of employers or others covered by Federal statutes, Executive orders, regulations or policies requiring equal employment opportunity;

(d) ensure that Federal departments and agencies develop their own standards and procedures for undertaking enforcement actions when compliance with equal employment opportunity requirements of any Federal statute, Executive order, regulation or policy cannot be secured by voluntary means;

(e) develop uniform record-keeping and reporting requirements concerning employment practices to be utilized by all Federal departments and agencies having equal employment enforcement responsibilities;

(f) provide for the sharing of compliance records, findings, and supporting documentation among Federal departments and agencies responsible for ensuring equal employment opportunity;

(g) develop uniform training programs for the staff of Federal departments and agencies with equal employment opportunity responsibilities;

(h) assist all Federal departments and agencies with equal employment opportunity responsibilities in developing programs to provide appropriate publications and other information for those covered and those protected by Federal equal employment opportunity statutes, Executive orders, regulations, and policies; and

(i) initiate cooperative programs, including the development of memoranda of understanding between agencies designed to improve the coordination of equal employment opportunity compliance and enforcement.

1-302. The Equal Employment Opportunity Commission shall assist the Civil Service Commission, or its successor, in establishing uniform job-related qualifications and requirements for job classifications and descriptions for Federal employees involved in enforcing all Federal equal employment opportunity provisions.

1-303. The Equal Employment Opportunity Commission shall issue such rules, regulations, policies, procedures or orders as it deems necessary to carry out its responsibilities under this order. It shall advise and offer to consult with the affected Federal departments and agencies during the development of any proposed rules, regulations, policies, procedures or orders and shall formally submit such proposed issuances to affected departments and agencies at least 15 working days prior to public announcement. The Equal Employment Opportunity Commission shall use its best efforts to reach agreement with the agencies on matters in dispute. Departments and agencies shall comply with all final rules, regulations, policies, procedures or orders of the Equal Employment Opportunity Commission.

1-304. All Federal departments and agencies shall advise and offer to consult with the Equal Employment Opportunity Commission during the development of any proposed rules, regulations, policies, procedures or orders concerning equal employment opportunity. Departments and agencies shall formally submit such proposed issuances to the Equal Employment Opportunity Commission and other interested Federal departments and agencies at least 15 working days prior to public announcement. The Equal Employment Opportunity Commission shall review such proposed rules, regulations, policies, procedures or orders to ensure consistency among the operations of the various Federal departments and agencies. Issuances related to internal management and administration are exempt from this clearance process. Case handling procedures unique to a single program also are exempt, although the Equal Employment Opportunity Commission may review such procedures in order to assure maximum consistency within the Federal equal employment opportunity program.

1-305. Before promulgating significant rules, regulations, policies, procedures or orders involving equal employment opportunity, the Commission and affected departments and agencies shall afford the public an opportunity to comment.

1-306. The Equal Employment Opportunity Commission may make recommendations concerning staff size and resource needs of the Federal departments and agencies having equal employment opportunity responsibilities to the Office of Management and Budget.

1-307. (a) It is the intent of this order that disputes between or among agencies concerning matters covered by this order shall be resolved through good faith efforts of the affected agencies to reach mutual agreement. Use of the dispute resolution mechanism contained in Subsections (b) and (c) of this Section should be resorted to only in extraordinary circumstances.

(b) Whenever a dispute which cannot be resolved through good faith efforts arises between the Equal Employment Opportunity Commission and another Federal department or agency concerning the issuance of an equal employment opportunity rule, regulation, policy, procedure, order or any matter covered by this Order, the Chairman of the Equal Employment Opportunity Commission or the head of the affected department or agency may refer the matter to the Executive Office of the President. Such reference must be in writing and may not be made later than 15 working days following receipt of the initiating agency's notice of intent publicly to announce an equal employment opportunity rule, regulation, policy, procedure or order. If no reference is made within the 15 day period, the decision of the agency which initiated the proposed issuance will become effective.

(c) Following reference of a disputed matter to the Executive Office of the President, the Assistant to the President for Domestic Affairs and Policy (or such other official as the President may designate) shall designate an official within the Executive Office of the President to meet with the affected agencies to resolve the dispute within a reasonable time.

1-4. *Annual Report.*

1-401. The Equal Employment Opportunity Commission shall include in the annual report transmitted to the President and the Congress pursuant to Section 715 of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-14), a statement of the progress that has been made in achieving the purpose of this order. The Equal Employment Opportunity Commission shall provide Federal departments and agencies an opportunity to comment on the report prior to formal submission.

1-5. *General Provisions.*

1-501. Nothing in this order shall relieve or lessen the responsibilities or obligations imposed upon any person or entity by Federal equal employment law, Executive order, regulation or policy.

1-502. Nothing in this order shall limit the Attorney General's role as legal adviser to the Executive Branch.

Jimmy Carter

THE WHITE HOUSE,
June 30, 1978

[FR Doc. 78-18686 Filed 6-30-78; 4:23 pm]

APPENDIX D

(OMB - EEOC Exchange of Letters)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

JUL 21 1981

OFFICE OF THE CHAIR

Honorable Edwin L. Harper
Deputy Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Harper:

I am writing to you because of my desire to ensure that coordination of Federal equal employment programs is as effective as possible. I am convinced that increased consistency, reduced duplication, and more efficient government-wide policies and procedures can have a substantial impact on the obtrusiveness of these programs without diminishing the protections afforded.

As you know, the statutory responsibility for coordinating implementation of equal employment opportunity legislation, orders, and policies is vested in the EEOC. Executive Order 12067 specifically directs the Commission to review all proposed rules, regulations, policies, procedures and orders relating to equal employment programs. The order requires agencies to work with EEOC during the development of such issuances and to submit them for formal analysis at least 15 working days prior to public announcement.

A number of agencies have expressed concern over the relationship between EEOC's regulatory review function and that of OMB under Executive Order 12291 on Federal Regulation. They are unclear on whether they should submit proposals to EEOC before OMB, submit to both agencies concurrently, or submit to EEOC subsequent to OMB approval. Indeed, a few agencies have used this perceived confusion as a justification for attempting to circumvent EEOC review entirely.

While I have been informed by Nat Scurry, the Assistant Director of OMB for Civil Rights, that EEOC clearance of equal employment issuances is expected to precede submittal to OMB and that I would receive a letter to this effect, I have not obtained any authoritative document concerning this matter from OMB. In order to promote government efficiency and regulatory certainty, I strongly urge OMB to take the initiative to resolve this apparent and unnecessary confusion.

Accordingly, I believe, it is important that OMB provide EEOC with a general statement in support of the equal employment coordinative function exercised by EEOC and a formal opinion specifying that review by EEOC is a condition precedent to submittal to OMB under Executive Order 12291.

If you believe that it would be helpful, I would be pleased to meet with you to discuss this matter in greater detail. I look forward to working closely with you in furthering the Administration's civil rights goals.

Sincerely,

J. Clay Smith, Jr.

J. Clay Smith, Jr.
Acting Chairman
EEOC

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SEP 9 1981

Honorable J. Clay Smith, Jr.
Acting Chairman
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Mr. Chairman:

This is in response to your letter of July 21, 1981, in which you expressed concern about the relationship of EEOC's responsibilities under E.O. 12067 and those of this agency under E.O. 12291.

James C. Miller, Administrator of our Office of Information and Regulatory Affairs, sent you a letter on August 12 that outlines a procedure that agencies are to follow when both Executive Orders pertain. A copy of that letter is enclosed.

I hope that Mr. Miller's letter answers any questions that you have and reinforces our intent that E.O. 12067 not be circumvented.

Sincerely,

Edwin L. Harper
Deputy Director

Enclosure

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

AUG 12 1981

Honorable J. Clay Smith
Acting Chairman
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Mr. Chairman:

I am writing to confirm the agreement that our staffs have reached regarding coordination of Executive Orders 12291, 12250, 12067 and the Paperwork Reduction Act of 1980 (P.L. 96-511). The development of complementary procedures for the execution of these Orders and this Act will help ensure that the goals of the Administration are met in a timely manner.

The principal feature of these procedures is that agencies will be required to submit any draft NPRM, final rule, or information collection that is subject to review under Executive Orders 12250, 12067, or the Paperwork Reduction Act to the Department of Justice or EEOC, as appropriate, before the NPRM, rule, or information collection is submitted to OMB under Executive Order 12291 or the Paperwork Reduction Act. After Justice or EEOC has cleared the NPRM, final rule, or information collection, DOJ or EEOC as appropriate, will submit the NPRM, final rule, or information collection to OMB for review under Executive Order 12291 or the Paperwork Reduction Act.

We expect the procedure to work as follows:

1. An agency proposing a draft NPRM, final rule, or information collection subject to Executive Order 12250 or 12067 will submit the proposed issuance to DOJ or EEOC, as appropriate.

2. DOJ and EEOC will perform their respective Executive Order functions, including the resolution of differences between the proposed rule and underlying statutes, case law related regulations, guidelines and policies, prior to submitting the rule to OMB for review under E.O. 12291 or the Paperwork Reduction Act. Where both DOJ and EEOC have jurisdiction over a draft NPRM, disagreement will be resolved prior to the draft being submitted to OMB or the unresolved issues clearly articulated.

3. DOJ and EEOC shall, as part of their reviews, study and attempt to minimize costs and paperwork requirements. DOJ and EEOC shall ensure that any benefit-cost analysis required by Executive Order 12291 is included in the NPRM or final rule. However, DOJ and EEOC are not required to perform a substantive review of the analysis.

4. DOJ and EEOC, as appropriate, will forward the draft NPRM, final rule, or information collection to OMB. To the extent that both DOJ and EEOC have jurisdiction over a draft NPRM, final rule, or information collection, the entity with primary jurisdiction shall forward it. The sponsoring agency will be required to provide EEOC or Justice supporting documents required by OMB under E.O. 12291 or the Paperwork Reduction Act.

DOJ and EEOC should notify agencies subject to their jurisdiction under Executive Orders 12250 and 12067 of these procedures. The OMB desk officers within the Office of Information and Regulatory Affairs will not accept for review any draft NPRM's, final rules, or information collections that have not been coordinated with DOJ or EEOC under Executive Order 12250 or 12067.

Should you or your staff have any questions, please feel free to call Mr. Nathaniel Scurry, OMB's Assistant Director for Civil Rights on 395-3556.

Sincerely yours,

/s/ James C. Miller III

James C. Miller III
Administrator for Information
and Regulatory Affairs

Mr. James C. Miller, III
Administrator for Information
and Regulatory Affairs
Office of Management and Budget
Executive Office of the President
Washington, D. C. 20503

Dear Mr. Miller:

I am pleased to acknowledge your letter of August 12, 1981, which confirms the implementing agreement reached by our staffs on the sequence of reviews under Executive Order 12067, Executive Order 11291 and The Paperwork Reduction Act. The agreement brings the substantial expertise of our respective agencies to bear on the problem of inefficient and ineffective regulatory requirements.

By clarifying and making complimentary the respective roles of EEOC and OMB in regulations review, we will strengthen and unify the Executive branch's response to regulatory, reporting and recordkeeping proposals dealing with equal employment opportunity programs. The review process outlined in your letter is in keeping with the goals of both Executive orders and The Paperwork Reduction Act, which are to reduce duplication, conflict and overlap and to choose the most effective and least burdensome approach for addressing a demonstrated problem. The EEOC will continue to conduct a detailed and prompt analyses of agency proposals to ensure the fulfillment of these goals, which are an important part of President Reagan's mandate for regulatory efficiency.

I have sent the attached memorandum to the heads of Federal agencies informing them of the amended procedures.

Sincerely,

J. Clay Smith, Jr.
Acting Chairman

Mr. HAWKINS. Thank you, Mr. Smith.

Do you wish Ms. Dupre to testify before we question you?

Mr. SMITH. No; we are prepared to answer questions at this time.

Mr. HAWKINS. Ms. Millenson, are you going to present testimony?

Ms. MILLENSON. No, Mr. Chairman, I am prepared to answer questions.

Mr. HAWKINS. Mr. Smith, you concluded on a very positive note, which the committee is very pleased to observe. This seems to refute the charge that we frequently hear that changes are necessary because not much is being accomplished under existing law and methods of procedure.

Would you say that there has been a reasonable reduction in the intensity of discrimination in the workplace as a result of the Equal Employment Opportunity Commission, and what authority has been given to that Commission by changes in the law in 1972, and otherwise?

Mr. SMITH. I think the enforcement authority that was given to the Commission in 1972 is viewed by us at EEOC as a deterrent factor. I believe earnestly that the business community, and the union community now recognize that EEOC is armed with litigation authority and I believe that that authority has been effective in deterring companies and unions from discriminating.

We still receive charges which is, of course, a measure of determining whether or not there is still employment discrimination in America. How we handle these cases now that is, rapid charge procedures, factfinding conferences, and so forth, is also a deterrent to employers because they see that we now are capable and have the resources to reach and to resolve employment discrimination grievances quickly.

Mr. HAWKINS. You described the EEOC's role as the lead agency in the equal employment field. Has the Equal Employment Opportunity Commission been consulted, or has it played any meaningful role in the development of the new policy positions and the proposed regulatory revisions as disclosed by the Department of Justice, and the Department of Labor?

Mr. SMITH. As appendix D of my testimony describes, it was not until July of this year that we were able to specifically firm up the coordinating function procedures with OMB.

Initially, the Commission's coordination activities with the Department of Labor were a little rocky, to be quite frank and honest, but I think we are now at a point where we are talking and coordinating as the Executive order intended.

In connection with the Justice Department, the only issue in that connection and I am not sure it comes within the coordinating function, is a letter we received from the Assistant Attorney General for Civil Rights in response to our Federal affirmative action program, which EEOC has jurisdiction over pursuant to section 17 of the Civil Rights Act of 1964, that letter raised a question, as it relates to the Department of Justice, about using goals and timetables in terms of the internal Federal affirmative action responsibilities of the Department of Justice.

The letter came in last week. I responded saying that based upon past precedents of both the EEOC and the Civil Service Commission, the predecessor of the Office of Personnel Management, EEOC clearly was on solid legal grounds in connection with our Federal affirmative action multiyear plan instruction as distributed to each Federal agency.

This is the only area where we have had any dialog, to my knowledge, with the Department of Justice since March 3 of this year, the date I became Acting Chairman of EEOC.

Mr. HAWKINS. In a recent hearing before the subcommittee, the Assistant Attorney General for Civil Rights, William Bradford Reynolds, announced that the Department of Justice, and I quote him "will no longer insist upon or in any respect support the use of quotas or any other numerical or statistical formulae designed to provide to non-victims of discrimination preferential treatment based on race, sex, national origin, or religion."

He further indicated that the Department would rely on racial or sex preferences, "only when necessary to place an individual victim of proven discriminatory conduct in a position he or she would have attained but for the discrimination."

Would you comment on that understanding of the law, and what would be the impact of proceeding according to that type of policy?

Mr. SMITH. Once I meet Mr. Reynolds, I will tell him that after he made that statement, he made my life unbearable at EEOC. My phone started to ring, and continued to ring for some time because of his statement.

I would like, if you will permit, Mr. Chairman, to answer that question in the context of Mr. Reynolds' statement that appeared recently in the Washington Post.

Mr. Reynolds, in explaining his policy statement in that newspaper, stated that his testimony "* * * concerns only the range of remedies the Department will seek in court following a finding of discrimination. In the past, the Department has routinely sought as an element of relief in this area, imposition of mandatory race and sex hiring goals designed to benefit a group of persons, without regard to whether those preferred are themselves victims of employers' discriminatory practices. We no longer insist on, or in any respect support the use of numerical or statistical formulae providing to non-victims of discrimination preferrential treatment based upon race, sex, national origin, or religion."

The article goes on then to explain what the Department will do in connection with affirmation action, only requiring, for example, increased recruitment efforts, injunctive relief efforts, and the like.

The history of title VII enforcement indicates to us that only affirmative action goals and timetables can successfully accomplish the objective of eliminating the vestiges of a pattern of discrimination. Historically, efforts to achieve this aim through enhancing the employer's recruitment pools, which is one of the affirmative action elements that Mr. Reynolds discussed, have been found to be insufficient.

Individual remedies have also failed to fully resolve the damage done by past discrimination, since such remedies depend for their effectiveness upon the Government's ability to identify individual victims. This is a difficult, if not an impossible, task. Many such persons may not possess sufficient information to know that they are or have been victims of discrimination. It may be impossible to locate persons who were discouraged from asserting their rights because of the employer's discrimination. Thus, only class-based remedies afford the necessary relief. I should add that class-based remedies also serve the interest of the employer in achieving finality in his litigation, consume less of his time and reduce his litigation costs and back pay liability.

Further, the simpler the remedy process, the more individual claimants will be encouraged to participate in a single proceeding, rather than pursuing independent litigation. This protects the employer against piecemeal litigation and piecemeal liability.

Finally, the pursuit of individual remedies is not feasible in the context of voluntary compliance. Voluntary compliance and voluntary affirmative action, while-not areas in which the Department of Justice is involved, are areas in which EEOC's efforts are concentrated, and we know that a major incentive to voluntary compliance is simplicity. As I noted in my testimony, class-based affirmative relief affords this simplicity. Focusing on individualized relief increases the cost and complexity of charge resolution to a level which may well make settlement impossible.

There has been a question raised, or at least it seems that there is now a cloud that is being raised, over the question of legality of affirmative action and the use of goals and timetables.

We believe that 706(g) of title VII, which specifically allows the courts to order affirmative action, clearly indicates that those who raise the cloud of illegality have misplaced the emphasis as it relates to the congressional mandate as we understand it.

The language of the statute gives the courts equitable powers. I think Congress placed this equitable language in the statute because it recognized that there may be times when equitable remedies would have to be fashioned to achieve the goals and objectives of the statute.

When EEOC goes into conciliation, it should be pointed out, it doesn't always ask for goals and timetables. It only requests or sues for goals and timetables after it assesses that they are appropriate remedies in the context of the particular charge or case. We are exercising our discretion in connection with the equitable relief language of 706(g) of title VII.

Mr. **Hawkins**. Would you say that the raising of the issue of affirmative action and the obfuscation that results from questioning the use of goals and timetables, even in the statements made by Mr. Reynolds, have in any way complicated compliance activity already by the Equal Employment Opportunity Commission?

In other words, have employers taken a harder line on compliance in their anticipation of a new administration policy?

Mr. **Smith**. I will ask staff to be involved in this answer. I can say for myself—in terms of my telephone calls—that his statement caused a number of calls to me that inquired whether or not goals and timetables are appropriate remedies for the EEOC to pursue now in light of this statement.

By the way, I think this really is—whether or not goals and timetables is an appropriate remedy—the only difference between Assistant Attorney General Reynolds' position and the position I am taking.

In answer to the question as to whether or not his testimony and his position are having an impact, I can say that they are, because the companies and the lawyers who have called me are saying: are you still going to pursue this matter of goals and timetables in your cases, since it appears to be the position of the Justice Department that they no longer will pursue such remedies?

That is my answer, and now I would like for the EEOC staff with me to respond. The staff says that it is too early to assess the impact of the statement. However, yesterday, I did some checking, and there have been some inquiries to the staff about the efficacy of goals and timetables in light of Mr. Reynolds' statement.

Mr. **Hawkins**. Would you say the scale may be shifting from goals and timetables to considerations of reverse discrimination?

Mr. **Smith**. I would say that the Reynolds testimony creates a theme that goals and timetables are, in fact, discriminatory because goals and timetables tend to benefit persons who are not victims of discrimination.

Of course, the request for goals and timetables, as it may relate to persons who are not victims, really goes to what Congress intended when it wrote in section 706(g) of title VII that the courts could fashion, No. 1, affirmative action, and, No. 2, that the courts had the power to provide equitable relief.

If you are an enforcement agency, you read the statute and say, "yes, affirmative action is permissible in enforcement, and, yes, fashioning equitable remedy, which might include goals and time tables, are also appropriate bases for enforcement." That is our position. We believe that goals and timetables are equitable provisions that have now been developed and have become very much a part of the jurisprudence. We feel that it is a basis upon which we can rely.

I would like to give an example, if I could. Take a cab company that is regulated by a local public utility commission. The local public utility commission says that you shall not charge but so much per mile. Let's assume the cab company then says, "We are going to violate the law and charge a higher rate."

A member of the public goes to the public utility commission and sues. The commission finds that the cab company, in fact, has charged an excessive amount. The commission then formulates a remedy, and that remedy is that the company has to reduce its charges for the next 50, 60, or 1,000 persons or for a particular period of time.

Now the victims, the people who paid the excessive amount, are gone. They are all over the country, and can't be identified. So as an equitable principle in order to uphold the law, the courts will allow the equitable relief fashioned by the commission to be imposed, even though the people who are benefiting from the lower fee are not the victims who are overcharged.

Because of the public interest standard, and because of the importance of the statute, it is our understanding that this is the way lawmakers are able to police this type of violation, when the victims are not present to receive the lower taxi fares.

I feel, and I was an antitrust lawyer before I came to the Commission, this is the way the Federal antitrust statutes operate. I really don't see why title VII enforcement should be put in a separate category from other statutes where the public interest standard is part of the statute.

Mr. HAWKINS. In other words, I assume that you reject Mr. Reynolds' nonvictim concept, and describe it as being somewhat unique in law.

Mr. SMITH. Yes.

Mr. HAWKINS. Mr. Washington.

Mr. WASHINGTON. Thank you, Mr. Chairman.

Thank you, Mr. Smith, and your staff. I want to thank you for an excellent statement. It is a very detailed and scholarly submission, and I certainly appreciate that.

Mr. SMITH. Thank you.

Mr. WASHINGTON. That kind of a submission has been missing in this dialog with witnesses up to this point. I particularly appreciate your summary of case law in the matter.

I mildly admonished Mr. Lovell for his lateness in submitting his testimony in this field. In all fairness, I must say the same would apply to your shop. We would have benefited by having this material in our hands, particularly because it is complicated, it is controversial, and it is not simple to follow.

Mr. SMITH. Yes.

Mr. WASHINGTON. I have no significant disagreement with anything you say. I quote the court in *Hall* v. *Werthan Bag Co.* as saying that "racial discrimination is by definition class discrimination." I think the chairman has nailed that point as contrary to a position taken by Mr. Reynolds who appeared before us last week.

I especially appreciate your statement that limiting remedies under title VII to identifiable victims of proven discrimination would be impractical from the standpoint of judicial administration, as well as totally ineffective. You use the problems encountered in *Lee Way Motor Freight* case as an example. I am not familiar with that case, or many others that you have cited.

I wonder if you would clarify the point about the *Lee Way* case.

Mr. SMITH. Why don't I have the people who were trying those cases do so.

Ms. MILLENSON. Mr. Washington, the point that we were seeking to make through that example is that the process of identifying individual victims of discrimination, even where liability has been proved and you have a court mechanism at your disposal, is an extremely time consuming, and unwieldy process. It is costly to the Government. It is costly to the employer. It doesn't necessarily provide a better remedy in terms of eliminating discrimination.

The entire time consumed in trying the individual claims in the *Lee Way Motor Freight* case was a period during which the employer's backpay liability was running. So where the case could have been settled at the conclusion of trial on the merits on a class-based basis, 4 additional years of backpay to these victims was due and owing at the end of the trial of the individual claims.

It took about three times as long to try the individual claims in the case as it took to try the nationwide pattern-and-practice action. The result was that relief was obtained for approximately 82 people, but because of the prolonged time involved in the trial and in the claims procedure, the remedy in terms of monetary relief to those 82 persons totaled close to $3 million.

The problem is emphasized if you look at the amount of EEOC's work in terms of charge processing and voluntary compliance, because in that area, of course, there is no mechanism like the judge and a special master, or some other tribunal to process these individual claims, and the amount of information available to the parties is much less.

The mechanism becomes increasingly awkward. This is a disincentive to settlement since the whole notion of settlement is to arrive at some faster and simpler resolution of claims.

Mr. WASHINGTON. So your reason for citing that case is the same reason you cited the antitrust law procedures, as being more efficacious in terms of resolving the systemic problem.

Mr. SMITH. Yes. Practically, as Ms. Millenson pointed out, that although some of our litigation involves hundreds of identifiable persons, at other times we cannot identify them, and if we tried to identify them at trial or during discovery, we might have to have hundreds of minitrials to determine whether or not Mr. Jones, Ms. Smith, Mr. Black, et cetera, discriminated against, where they should be placed in the system, and how much back-pay they should be awarded.

When we look at EEOC and employer resources, we just feel that this could become oppressive. This is the way we practically view it.

Mr. WASHINGTON. On pages 10 and 11, you deal with interagency coordination, and you refer to the current interagency coordination between your shop and the OFCCP relative to the recently proposed changes in regulations.

Can we pinpoint that? Were you involved ab initio, was your shop involved in the development process by which these new rules came out?

Mr. SMITH. No; not in the initial phase. EEOC became involved when those regulations were in complete form and submitted to us under the coordination function. There was no preliminary discussion with EEOC in the formulation of the initial proposed regulations.

Mr. WASHINGTON. So you were faced with a fait accompli in that respect?

Mr. SMITH. I will say this, we like to think that, to use your language, if it was a fait accompli, we were able to provide our input to the Department of Labor and the Office of Federal Contract Compliance Programs prior to the publication of the regulation in the Federal Register. Thus during the coordination period, we voiced concern about certain issues, the threshold question being one, the duration of the affirmative action plans being another.

We agreed with some of the proposals. We disagreed with others. But during the coordination period, our staff and OFCCP's staff came together and tried to work out a common position. When some of our comments were not adopted, we asked that the OFCCP place within the public notice our reservations about the proposals. This they did. After this phase of rulemaking has been completed, as Ms. Shong pointed out, EEOC will have another opportunity under the Executive order to work out a resolution of the differences.

Mr. WASHINGTON. I may be wrong, but statutorily doesn't the interagency coordinational function place your shop in the ascendancy, or do I have the picture wrong?

Mr. SMITH. In what, Congressman?

Mr. WASHINGTON. In front?

Mr. SMITH. Yes. You mean as the lead agency?

Mr. WASHINGTON. Yes.

Mr. SMITH. We believe that the Reorganization Plan No. 1 of 1978 and Executive Order 12067 places EEOC as the lead agency.

Mr. WASHINGTON. Which means what?

Mr. SMITH. Which means that Executive Order 12067 allows the EEOC to receive proposed rules and regulations which have impact on equal employment opportunity, and to assess whether or not these rules and regulations are consistent with title VII principles. What we try to do is to coordinate by persuasion and the like with other agencies to bring their proposed rules and regulations in line with the title VII principles, so that there will not be any inconsistencies. In other words, we try to use our expertise to provide information to other agencies like OFCCP. For example, we might say to an agency, "Do you realize that if you do this, this result will occur, or if you do that, that result will occur."

Mr. WASHINGTON. You lack the power to reject them, though?

Mr. SMITH. We do not have the power to reject a proposal. What we do have, if there is a disagreement between us and an agency is the power to appeal the issue to the President. This is called an impasse. It is like a bargaining process. But we have always been able to work out the differences that we have, and let me tell you why.

The Commission is not the chairman—the Commission is made up of five people.

Mr. WASHINGTON. How many are present now?

Mr. SMITH. There are only two. We don't have a quorum.

Mr. WASHINGTON. So you have no power to act.

Mr. SMITH. Yes, we do.

Mr. WASHINGTON. You do?

Mr. SMITH. Yes, when the Commission had a quorum, it delegated its authority to me, and I received it very reluctantly, I will have you know.

Mr. WASHINGTON. Having that power, did you agree with the rules and regulations, the changes?

Mr. SMITH. When the proposed OFCCP regulations were before us, we had a quorum. The regulations were proposed 2 months ago. They have been out for public comment for nearly 2 months, maybe 3 months now.

Mr. WASHINGTON. So you had reservations about the regulations.

Mr. SMITH. Some aspects of them.

Mr. WASHINGTON. You filed objection to them?

Mr. SMITH. We sent them correspondence outlining our differences.

Mr. WASHINGTON. Were your objections duly published according to law?

Mr. SMITH. They were not published, and it is not required by law that they be published. We merely sent our objections or our differences by letter to OFCCP, hoping that they would alter the regulations they were going to put out for public comment. We never obtained an agreement from them to incorporate our comments into the proposed regulations.

Mr. WASHINGTON. But you filed formal comments?

Mr. SMITH. Yes, and we asked them to place within the preamble of the regulations a comment that EEOC had reservations about some of the proposals.

Mr. WASHINGTON. Which they did not do.

Mr. SMITH. Yes, they did.

Mr. WASHINGTON. They did?

Mr. SMITH. They did put our comment in there, yes.

Mr. WASHINGTON. Are these regulations procedurally defective in any way?

Mr. SMITH. I am not quite sure I understand your question. Do you mean in terms of their issuance, or in terms——

Mr. WASHINGTON. The procedure by which they were promulgated from point one to the Federal Register notice?

Mr. SMITH. No, I don't think so.

Mr. **Washington**. You point out your reservations about them in your submission here, I notice.

I am a little confused by your disclaimer which preceded your statement. You suggest that you have no authority to speak on behalf of the administration, and yet I thought the whole point of EEOC, and the Congress went to some pain to structure a bipartisan commission, with Commissioners appointed for fixed terms on a staggered basis, so that they compose a deliberative body which could presumably speak for any administration, and over any administration.

Mr. **Smith**. My statement was written with deference to the President's choice for a permanent EEOC Chairman, whose hearings were held yesterday.

Mr. **Washington**. But this thing was being processed, and obviously and clearly there is not enough time. We don't know when the chairman will be confirmed, or the Commission will be brought up to its full strength.

I am just raising the question. To be bound by an administration in which you are sworn to uphold some laws, and not speak out on an issue from a bipartisan point of view seems to me, shall we say, not fully living up to the responsibilities of the Commission, particularly when you had objections or reservations about these changes.

Mr. **Smith**. I am here, and I am speaking.

Mr. **Washington**. Belatedly, you are here. We welcome you here, but the point is, I am trying to find out just there were no objections made to the President, it might have dissuaded him.

Mr. **Smith**. We did make objections to OFCCP during the coordination process.

Mr. **Hawkins**. Mr. Washington, would you yield?

Mr. **Washington**. Yes, Mr. Chairman, I will be happy to yield.

Mr. **Hawkins**. It is my understanding that you were asked to comment on the proposed regulations, and that the Acting Director of the Office of Interagency Coordination has responded. Is there any particular reason why that response, which you asked for and you did respond with comments, could not be made available to the committee?

We would like to have it inserted into the record, if that is possible.

Mr. **Smith**. You mean the response that we sent to the OFCCP?

Mr. **Hawkins**. That is correct, yes.

Mr. **Smith**. We can provide you with that, yes.

Mr. **Hawkins**. If you would because we have only indirect knowledge of it. If it can be made available, we would appreciate it.

Mr. **Smith**. You mean the position of EEOC?

Mr. **Hawkins**. The comments that you made to the Office of Federal Contract Compliance Programs. I understand the comments were made by Mr. Bielan in response to a request. I am simply asking whether or not that can be made public, and if so, if we receive a copy of those comments, we will have those entered into the record at this point.

Mr. **Smith**. We will submit those.

Mr. **Hawkins**. That may in some way respond to Mr. Washington's question.

Mr. **Washington**. Thank you, Mr. Chairman.

Mr. **Smith**. We will do so.

Mr. **Hawkins**. Thank you.

[Information referred to appears at end of hearing.]

Mr. **Smith**. Also, I would like to say to Congressman Washington that the final rules have not been published. We are only in a notice of proposed rulemaking phase. This is the first cut. Once the public comments are submitted to OFCCP, under the Executive order, prior to publication of the final rule, OFCCP must submit the proposed final rules to the EEOC.

So we are not out of the picture.

Mr. **Washington**. I have a sneaking feeling that the final proposals were written at the same time the ones that were published were written.

I appreciate your reference to popular misconceptions, but don't you think that it would be a good idea to further publish for the American public what the law requires, as well as what it does not require. That might be part of the problem. I don't think the people clearly understand what you are doing, and I think the fact that they don't understand it makes it possible for people who deliberately want to warp, and twist, and turn what you are doing to have a field day.

Is it possible that the EEOC should take a stronger public stand in terms of just educating the public about this?

Mr. **Smith**. I agree with that. I will, in response to that, issue a yearend report to the civil rights and business community shortly.

Mr. **Washington**. It has been said that the Equal Employment Opportunity Commission coerces settlements, and it settles cases over which it has no jurisdiction. I don't subscribe to that, but I would like you to respond to it.

Mr. **Smith**. When you are an enforcement agency like the Securities and Exchange Commission or like the Federal Communications Commission, where I was in the General Counsel's office for 4 years, the persons against whom the enforcement action is brought are never satisfied with the action of Government.

In response to your question about forcing people to settle, 60 percent, of the business community has indicated, and it is now part of the Government's records since the Government Accounting Office included these statistics in its own report that they like the way EEOC is presently conducting business. This is not EEOC puffing. This is a finding of fact by the Government Accounting Office.

Now the question about coercion. Let's see how it functions. Someone is discriminated against. They come through our doors. We have people there to assist them in filling out the charge forms. Under our own rules, we notify the employer, and say, "There is a charge against you." That employer has an opportunity to come to EEOC and sit down with the charging party and EEOC to try to work out the grievance.

The charging party tells his side of the story, and the employer's personnel person or lawyer tells the employer's side of the story. The employer knows whether or not they have discriminated because this knowledge is peculiarly within their control.

Having represented management myself when I was in private practice, I suspect that many times management says, "Look, it is much cheaper to settle this case than to have a panoply of enforcement personnel come in, because we may have a lot of other problems in here." We may have age discrimination, we may have equal pay violations, we may have sex discrimination, race discrimination or national origin problems.

So the question is, if you want to use the term coercion, what is really propelling business to settle? It is not coercion on the part of the EEOC. That EEOC fact-finding officer doesn't bludgeon the employer to settle the case.

The employer can walk away and never come back. The only remedy we have is to put that charge into extended investigation and develop a litigation posture which might take two years before the General Counsel recommends to the Commission that it authorize litigation.

Coercion, that is a nice term. But I have been to factfinding conferences, I have sat through many. I have sat through them in Dallas, in Denver, in Atlanta, and in Memphis in the 4 years that I have been on the Commission, and I have not seen any coercion.

I have seen charging parties that feel that EEOC is coercing them. We get complaints from both sides. But we have a mechanism that we feel is administratively appropriate to bring the parties together.

So, I don't believe, based upon my own personal observation, that the charge of coercion is appropriate. I am not saying that we are perfect, and I am not saying that there may not be some techniques that may be used that are not appropriate.

I am not saying that before this committee. But I am saying that as far as a national policy that is passed by the five sitting Commissioners, and by the senior staff, that is not the policy that we have sent out the district offices and the area offices which constitute the Equal Employment Opportunity Commission.

Mr. WASHINGTON. I am glad to hear that. The rationale of the people who claim that there is coercion is similar to that by many of the coverage jurisdiction on the Voting Rights Act. They submit to consent decrees, and then claim they were coerced in consenting to consent decrees, but all the time they were just trying to hide something else, or they were so wrong on the issue there was no reason to fight any further.

Last of all, I want to transmit to you a complaint against the Commission by another prominent Member of the House. The charge was made by Congresswoman Pat Schroeder. She appeared before our committee, and she was very disturbed that no one from your agency appeared before them on request.

That obviously cannot continue. Congress gets the impression, or the various committees get the impression, that the EEOC people and the OFCCP people are not appearing when called upon reasonably, with due notice. I think it will not go too well with agencies which have to have good relationships and harmony with the Congress, particularly in these rather perilous times for civil rights, if I might say so.

I would suggest to you that you make your peace with her, and there is every available opportunity because she is not hard to get along with.

Mr. SMITH. I get the message.

Mr. WASHINGTON. I yield, Mr. Chairman.

Mr. HAWKINS. Finally, Mr. Smith, may I just ask a question with respect to the budget cuts. We estimate that you could be facing what amounts to a 25 percent reduction in the budget.

Could you give us just a brief explanation of how this would impact on the EEOC? Would it adversely affect the employees, or would it be absorbed as was suggested this morning by the current staff, et cetera?

Mr. SMITH. I am in the process, immediately after this meeting, of going back and responding to the request by the Office of Managment and Budget on a proposed reduction of 12 percent for the 1982 budget.

As you know, the proposed budget that the President supported initially was $140 million. When I became Acting Chairman of the EEOC, this was the figure that OMB initially had recommended.

As of this week, we have been advised by OMB that our previously approved 1982 budget of $140 million will be reduced by 12 percent, or $17 million, to a total of $123 million. So we have come down $17 million from what we thought we would have, at least, that is what the contents of the letter from OMB indicate.

The impact of that, as we understand it will be: (1) An inability to process the title VII, Age Discrimination in Employment Act, and Equal Pay Act charges within a reasonable time; (2) a dramatic reduction in the number of cases filed for litigation, and (3) reduced efficiency in the critical staff functions of policy direction, program guidance, coordination, and monitoring and evaluation of the Commission's charge-processing and litigation programs.

In 1981, when the Commission testified for the $140 million, it had some concerns about even that level because it was felt that the time for EEOC to process charges would be lengthened. My major concern now, looking at $123 million, is that the Commission's inventory of title VII complaints will grow by over 65 percent, from 37,000 complaints, or 8½ months of workload, to 62,200 complaints, or 12 months of work-load during fiscal year 1982. Its ADEA complaints will rise by over 50 percent; and the inventory of the fair employment practice agencies, will rise from 36,000 to 48,000 complaints.

What this means, essentially, is that people are going to have to wait longer for their charges to be resolved.

Backlog has been, as you know, the bug-a-boo of EEOC. I don't care where I go, I don't care whether it is with friends or foes, EEOC and backlog, unfortunately, have become synonymous. We have cut into the backlog, but I don't see how we can have a substantial reduction in the backlog in fiscal year 1982 if we are cut by $17 million.

In connection with our litigation program, a $17 million cut will force the Commission to release some of its legal staff, since the projected budget impact will be that the Commission's personnel ceiling will be reduced from 3,487 to 3,000 staff years. During the last fiscal year, our resources were reduced by 287 staff years, so that within a matter of 8 months we could come down 700 staff years.

In addition, we may have to assess whether or not we have to withdraw some of our litigation. I say this not for public fanfare, but because we simply are not going to have the money to litigate.

We have approximately 800 cases in litigation now. Those cases require costly expert testimony. We may have to reconsider some of those cases and withdraw some of those complaints if the Commission's fiscal year 1982 budget is reduced by 12 percent.

Mr. HAWKINS. Mr. Smith, I hate to interrupt you, but an important vote is pending. I recognize that to take a recess would be asking too much of the witnesses.

Could I ask you to submit to the committee the rest of particular response on the impact of the budget. If possible, we would like to have a copy of the EEOC response to the Office of Management and Budget. If that can be made available, would you submit that also?

Mr. SMITH. We will do so.

Mr. HAWKINS. At this time, because of the pending vote, and the difficulty of trying to estimate what time we will resume, we would like to conclude the hearing, and to dismiss the witnesses.

May I express the appreciation of the committee to all of you who have appeared on this panel. I think you have been very forthright, and I think under very difficult circumstances you are doing a very commendable job. The committee would like to commend you for carrying on your duties as you have.

Mr. SMITH. Thank you.

Mr. HAWKINS. Thank you very much for the testimony this morning.

That concludes the hearing today.

[Whereupon, at 1:05 p.m., the subcommittee adjourned, to reconvene at the call of the Chair.]

[Material submitted for inclusion in the record follows:]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

JUL -2 1981

Ellen M. Shong, Esquire
Director
Office of Federal Contract
Compliance Programs
U.S. Department of Labor
Washington, D.C. 20210

Dear Mrs. Shong:

The Equal Employment Opportunity Commission is pleased to respond to the Department of Labor's request for prepublication comments under the consultation requirements of Executive Order 12067 on the Department's Notice of Proposed Rulemaking dealing with its affirmative action regulations for contractors. The Commission applauds your effort to reduce burdens on smaller employers; to diminish the paperwork requirements of the contract compliance program; to introduce regulatory simplifications; and to reconcile the contract compliance requirements to those imposed by the Commission under Title VII of the Civil Rights Act of 1964.

The Commission is concerned, however, that the proposed Notice fails to meet these objectives in several significant respects. The Commission has sought to highlight these areas in the comments contained herein. These comments represent the Commission's informal response to the NPRM, after an initial review and discussion among various staff members and the Commissioners. In this review, we have attempted to be as thorough and far reaching as possible. The stringent time limitations which we have attempted to adhere to, however, have precluded the type of open and frank interagency discussion which is essential to the formulation of sound governmental policy in the area of equal employment opportunity. Such discussion is always appropriate; it is even more necessary now in light of the inconsistencies between the proposed regulations under the Executive order and established standards under Title VII. Accordingly, the Commission has asked me to initiate discussions with you to address these issues more fully.

The Commission's comments are of three types. The first specifically endorses a number of sections which promote simplification and consistency. We also offer modifications to several of the proposals which should further these goals.

The second set of comments is devoted to a discussion of parts of the draft NPRM which we believe are inconsistent with the Department's effort to reduce burdens and encourage voluntary compliance. We propose alternatives designed to provide the maximum cost savings and efficiency consistent with the overall thrust of the contract compliance program.

Finally, we critically discuss the method in which this proposal was developed and the manner in which the Department proposes to solicit the views of the public on this important issuance. We proffer suggestions for obtaining the most constructive and helpful comments from all interested parties.

Endorsements

We note with approval conscientious attempts to conform the contract compliance program to the Commission's requirements, such as: defining "applicant" to conform to the Uniform Guidelines on Employee Selection Procedures; raising the reporting requirement from 50 to 100 employees for EEO-1 (Standard Form 100) purposes; and delegation of authority to sign conciliation agreements to field directors as is the Commission's practice. We similarly endorse as useful regulatory simplifications: the elimination of the requirement for notification to the Director of OFCCP of the award of subcontracts of $10,000; the deletion of the subpart of the regulations consisting of suggestions and the Department's plans to publish them in a series of interpretive bulletins to contractors.

We believe that these changes will reduce contractor and OFCCP costs, eliminate marginal paperwork, and decrease the level of uncertainty which surrounds the program, while having only an insignificant effect on the protections provided by the Department. There are other changes which we support, if modifications are made either to make them more consistent or to add needed clarification.

1. Although we endorse the idea of making the backpay liability period the same under the contract compliance program as under Title VII, we recommend modification of Section 60-1.71 to indicate that the two year period will date from the time a complaint is filed with OFCCP or from the date of notification to the contractor by OFCCP in the case of a compliance review. With this slight change, your proposed rule would clearly parallel Title VII's requirements, which is appropriate, since most violations of the Executive order program also are violations of Title VII.

Second, where equal pay violations are uncovered during a compliance review, the two- and three-year Equal Pay Act statutes of limitations should apply. Absent a statement of Congressional intent to alter these timeframes under the EPA, it would appear inappropriate to apply a different standard to findings under the Executive order.

2. We concur in the argument that the preaward requirement imposed an inefficient burden on OFCCP and on some contractors. Accordingly, we agree with the elimination of the preaward program as a routine administrative enforcement device, but recommend that the proposal state that OFCCP retains discretion to schedule its compliance reviews to precede or to follow closely upon the award of contracts which are either unusually large and/or which have the potential for creation of a large number of new jobs. Such reviews are critically important in these cases to assure that the affirmative action objectives of the Executive order program are met. Realistically, opportunities for increasing the representation of women and minorities in the workplace are greatest where new jobs are created.

3. We support the proposal for development of abbreviated affirmative action plans by small contractors. However, we recommend that contractors with between 100 and 250 employees be permitted to develop abbreviated plans. This is

consistent with our recommendation, presented later, that thresholds for the requirement of a written affirmative action plan be set at 100 employees and $250,000. It is our view that abbreviated plans are not appropriate for contractors with substantial numbers of employees, e.g., 250-500, and that the cost savings to these contractors would be minimal.

4. We concur in the reductions and simplifications made in the current 16 affirmative action steps required of construction contractors to reduce the number to 9. This change eliminates many paper requirements which no longer appear necessary and could stimulate innovative, voluntary affirmative actions by construction contractors. Nevertheless, we are concerned about the deletion of step K dealing with the requirement to comply with the Department's 60-3 regulations, Uniform Guidelines on Employee Selection Procedures. We urge that this step be retained to avoid any misinterpretation by construction contractors who might erroneously conclude that its deletion relieves them of responsibility for conforming with the Guidelines' requirements.

5. We endorse the idea of permitting consolidation of affirmative action plans by redefining the term "establishment" because of the reduction in unnecessary paperwork projected. There appears to be little gained by having small establishments which come under the same personnel authority and responsibility develop independent plans. We also agree that where establishments are in different recruitment areas there is a need for the employment data for each establishment to be identified separately. We presume that the separate employment data referred to consists of a separate availability estimation and workforce and utilization analysis documentation. We recommend that this be explicitly stated in the regulation for the sake of clarity. Provision of mere summary data for establishments in different recruitment areas could mask underutilization or discrimination in one establishment by subsuming its data in a larger base.

Suggested Revisions

In our review of the following proposals, we were mindful of the announced goals of the draft Notice to reduce unnecessary burdens, to strive for consistency with Commission practice, and to introduce regulatory simplicity. Our analysis relates the objections which follow to one of the announced goals and in each case concludes that the alternative we suggest will better foster the achievement of these goals.

1. OFCCP Proposes Contradictory Definitions of "Qualified Handicapped Individual." Page 49 of the Preamble states that the Department is still considering the Notice of Proposed Rulemaking implementing Section 503 of the Rehabilitation Act of 1973 which was published for comment on December 30, 1980. The basic purpose of that Notice was to reconcile the Department's 504 and 503 regulations by defining key concepts in an identical fashion, including the definition of qualified handicapped individual and adoption of a common appendix providing guidance on the meaning of reasonable accommodation under both programs. In addition, the December 30th Notice would have given identical guidance on the timing of preemployment physicals under both programs.

The effect of the statement in the Preamble and the proposed publication of 503 regulations as proposed rules is that the Department will be seeking comments on two different definitions of "qualified handicapped individual." The December 30th Notice proposed to define the terms as meaning one who is "capable of performing the essential functions of the job or jobs for which he or she is being considered with reasonable accommodation." The draft Notice sent to the Commission for review proposes to define the same terms as meaning one who is "capable of performing a particular job with reasonable accommodation to his or her handicap."

This confusing and contradictory result could be avoided by republishing the December 30th Notice (making the amendments required by the 1978 amendments to the Rehabilitation Act and amendments to conform the program to the new proposed thresholds for triggering the affirmative action requirements). We recommend this course of action since otherwise the difference between the Department's final 504 regulations and its 503 regulations will remain, leaving contractors who are subject to both regulations with different rules for the same employee.

2. OFCCP Proposes Higher Thresholds for 402 and 503 Than For Executive Order 11246. The announced intent of the proposed Notice is to amend the 402 (Vietnam Era Veterans Readjustment Act of 1974) and 503 thresholds to make them consistent with practices under Executive Order 11246. Instead, the proposed thresholds requiring written affirmative action plans under 402 and 503 are considerably higher, because there is no provision allowing government bills of lading to be accumulated to reach the threshold dollar amount as is the case under the Executive order program. We are unaware of any justification for this inconsistency and recommend that the accumulation provision be extended to the 402 and 503 programs in order to achieve the intent stated in the Preamble.

3. OFCCP Proposes Guidelines Coordinating the Position of Various Agencies on the Manhart Issue. On page 12 of the Preliminary Impact Analysis, the Department proposes to develop at a future date a regulation coordinating the positions of various agencies on the Manhart issue. This is the first notice that the Commission has received that the Department of Labor is developing a "forthcoming regulation coordinating the positions of various agencies." We find it particularly objectionable for this notification to be obtained in a document already sent to OMB. By statute, this Commission is charged with the responsibility for coordinating government equal employment policies. If the Department believes that guidelines on this issue are necessary, it should contact the Commission's Office of Interagency Coordination to discuss the issue. Unilateral publication by the Department of its intention to propose guidelines, no less to coordinate development of them, is inappropriate. Accordingly, we request that this statement be deleted from the Preliminary Impact Analysis before it is available for public inspection.

4. OFCCP Proposes to Adopt a Lesser Affirmative Action Obligation for Elimination of Sex Segregated Seniority Systems Than For Other Discriminatory Practices. The December 30, 1980 final regulations added the words "and provide appropriate relief" to the OFCCP's Sex Discrimination Guideline provision dealing with segregated seniority systems and provided an extensive discussion of their significance in the Preamble. Although the Preamble of this proposal states that no changes were made to this part of the December 30, 1980 final regulations, this phrase has been deleted from the proposed Notice. The Department should withdraw this deletion since it gives the impression that the Department has concluded that retrospective relief is unavailable where sex segregated seniority exists. This contrasts with the Department's position in other parts of the Preamble and NPRM which clearly indicate that it is not proposing in this draft Notice to eliminate retrospective relief requirements from the contract

compliance program. This unexplained inconsistency in treatment of violations of the Executive order can only breed confusion and uncertainty, two problems which the Department has tried hard to dispel in other parts of its regulation.

5. OFCCP Proposes to Adopt a Different Standard for Discrimination Because of Pregnancy. The draft Notice proposes to adopt all of the Commission's guidelines on interpretation of the Pregnancy Discrimination Act except for Section 1604.10(c). This would put contractors in the position of having two contradictory rules applied to them by the two major equal employment opportunity agencies. This is contradictory to one announced purpose of this proposed Notice, i.e., to reconcile the rules of the contract compliance program with the Commission's practices under Title VII. The Department has used the consistency rationale when the Title VII rule is less burdensome than the contract compliance rules, such as in the instance of backpay liability or thresholds for reporting on EEO-1. In this instance, the Department's position is inconsistent and will result in no cost saving to contractors since they also are covered by EEOC and will be held to the disparate impact standard by the Commission. Furthermore, there is no credible reason given for the proposed deviation from a previously agreed upon Department position on this issue. The comment on page 12 of the Preliminary Impact Analysis relating to cost is unpersuasive, since the Department proposes to adopt all but this one part of the Commission's Guidelines on the subject. Again, we note that the Commission is willing to discuss this policy or any equal employment issue with the Department if the Department so desires, but the attempt by one agency on its own to undo a negotiated government-wide policy will have a deleterious effect on all affected by equal employment regulation, including employers. Therefore, we recommend that the Department adopt the Commission's position on pregnancy discrimination.

6. OFCCP Proposes to Adopt a Different Standard on Sexual Harassment. Our observation is essentially the same as our comment on the proposed deletion of part of the EEOC Pregnancy Guideline mentioned above, i.e., to propose a different and lower standard is contradictory to the announced goal of this proposed Notice and would result in contractors being subject to different rules on the same matter. Moreover, the statement contained on pages 19 and 20 of the Preamble to the effect that the Commission's Sex Discrimination Guidelines provision may result in contractors being held responsible for conduct or situations over which they had no control is a distortion of Section 1604.11(e) of the Guidelines. That section states: "In reviewing these cases, the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees." It is not the Commission's intention to hold employers accountable for acts of non-employees over which they have no control. We suggest that the Department adopt the standards of the EEOC Sexual Harassment Guideline, including the qualification quoted above.

7. OFCCP Proposes to Adopt Different Religious Accommodation and National Origin Requirements. In the December 30, 1980 final regulations, the Department stated that it intended to reconcile its religious accommodation rules with those of the Commission which became final on November 1, 1980. The Department has had a sufficient period of time to make such a reconciliation since it first announced suspension of the December 30th regulations. It has raised no substantive objection to the EEOC Guidelines either in the NPRM or in discussions with the Commission. We suggest that the Department make the reconciliation

and thus avoid a situation in which contractors are held to two standards on the same subject.

In addition, on December 29, 1980, after consultation with the Department, the Commission adopted amended Guidelines on National Origin Discrimination. We suggest that for the sake of consistency, the Department also reconcile its proposal with EEOC's National Origin Guidelines.

8. OFCCP Proposes to Adopt Unnecessarily Complex and High Threshold Requirements. In keeping with the Commission's agreement with the Department's goal of introducing regulatory simplicity and reducing the reporting burden on small employers, it concurs in the decision that the thresholds for application of the written affirmative action plan requirement need adjustment. The Department's proposal for a 250 employee and one million dollar threshold produces a very substantial reduction in covered contractors and plans prepared and a significant diminution in the number of employees protected. The Department's rationale for its proposal is based on the effect of inflation and on the desire to reduce contractor burdens. We believe that a 100 employee and $250,000 threshold has the virtue of administrative simplicity, is a more accurate reflection of the effect of inflation, and better balances the need to reduce the burdens imposed by the program and the need to maintain an acceptable level of protection for employees.

We propose that, for the sake of consistency and administrative simplicity, the employee threshold be set at 100 employees. Any employer with less than 100 employees would have no reporting or written affirmative action obligations. Contractors with 100 employees would have both the EEO-1 and the affirmative action obligations. There would be no bifurcation of responsibilities.

With regard to the dollar threshold, we accept the Department's rationale that the amount should be adjusted upwards to account for inflation which has occurred since the $50,000 figure was set in 1965. Since $150,000 is more reflective of the inflation effect, we recommend $250,000 as the threshold to give contractors and the public assurance that the Department will not be required to adjust the figure again in the near future simply to account for the impact of inflation.

Our recommended thresholds would accomplish the same regulatory objectives and be less subject to challenge as being arbitrary. Using the numbers provided in Table 4 of the Department's Preliminary Impact Analysis, the 100 employee/$250,000 threshold still would cause a 52.6% reduction in the number of companies required to file affirmative action plans, while retaining coverage on 95.4% of employees working for companies required to have written affirmative action plans. Increases beyond the thresholds proposed by the Commission will result in a percent reduction in employee coverage for every percent in the reduction of contractors covered by the written plan requirement. The percent decrease in employees covered by the program is even greater than the percent decrease in the plans to be prepared. The Department's greater thresholds clearly are at the direct expense of covered employees. Since these thresholds supplement reductions of more than 50% of covered contractors and more than 60% of plans, they must be supported by persuasive evidence demonstrating that cost savings justify an almost 20% reduction in those protected by the program. The reductions we propose, along with the use of abbreviated affirmative action plans for employees with between 100 and 250 employees, provide substantial relief for small contractors without significantly decreasing employee protection.

If the Department adopts the $250,000 level which we propose, the deletion (with the exception of government bills of lading) of the contract aggregation provision is appropriate because of the relatively small dollar amounts involved. By contrast, if the Department rejects our proposal and raises the threshold to a million dollars, we recommend that aggregation of contracts during the course of a year be permitted. To exempt an employer who had several Federal contracts in the $800,000 to $900,000 range would be a gross violation of the intent of the program.

9. OFCCP Proposes to Authorize "Extended Duration Affirmative Action Plans" Without Proper Safeguards. We agree with the principle that contractors with good affirmative action performance should not be subject to repeated, unnecessary compliance reviews. Accordingly, we are in sympathy with the basic notion presented in the Department's proposal to create a concept of "extended duration affirmative action plans", but we have several concerns about the specific provisions of the concept.

The provision which authorizes the Director to provide an up to five year exemption from compliance reviews upon certain conditions is troublesome in some respects. First, the five-year period seems unnecessarily long. We believe exemptions should be granted for two, or at the most three years. At a time when economic conditions and a contractor's place in the competitive market may change dramatically, a five year exemption appears unwise. In line with this, the Preamble to the regulations should provide that, in determining whether a contractor is entitled to an exemption, the Department will seek from the EEOC information as to the pendency of individual or class complaints under Title VII.

Second, we share your desire that contractors utilize approved training programs. Training programs are often an essential ingredient of voluntary compliance with Executive Order 11246 and with Title VII. We believe, therefore, that the Department, in the Preamble, should make a commitment to issue instructions to its staff and the public setting forth the criteria it will use in reviewing training programs. The Department should also take into account that there are times when a contractor may not need a training program. In such instances, it would be inappropriate to predicate the exemption from compliance review activity upon existence of a training program.

A number of points in the proposal require clarification. It appears that during the period of exemption, the contractor would not have to update the affirmative action plan annually. This idea makes sense in those cases where the contractor has set goals for each year of the exemption. If the exemption exceeded the duration of the goals, it would be difficult to assume that the contractor's voluntary efforts would be satisfactory during the exemption period. The proposal also appears not to require that complaints be investigated during an extended duration affirmative action plan. A positive finding in a compliance review does not ensure that individual acts of discrimination will not arise during the exemption period. Those individual complaints should be forwarded to EEOC under the EEOC/OFCCP Memorandum of Understanding. If a class or systemic complaint alleges a set of facts which were or should have been covered during the compliance review, then the Department would have no obligation to act on it; but if the complaint is filed during the last year of the exemption, the Department should be required to take some action with regard to it.

To sum up, we recommend that where a contractor has received a finding of compliance as a result of an onsite compliance review, and, where appropriate, has a linkage agreement or other acceptable training program, the contractor should receive a two or three year exemption from compliance reviews and from updating affirmative action plan annually providing the employer's plan had goals covering the period of the exemption. Of course, employers requiring conciliation agreements or letters of commitment to come into compliance would not be eligible for the exemption. During this period, individual complaints would continue to be sent to EEOC for investigation, and class or systemic complaints -- unless based on matters covered during the compliance review--would be investigated under the procedures set forth in proposed Section 60-2.3(c).

10. OFCCP Proposes to Adopt a Definition of "Underutilization" Which Is An Inappropriate Application of the Uniform Guidelines on Employee Selection Procedures. We are in fundamental agreement with the policy of allowing greater flexibility to contractors in determining when to adopt goals and timetables. We believe, however, that not requiring goals when a contractor has 80% of availability as proposed by the Department is an inappropriate application of a similar rule in the Uniform Guidelines on Employee Selection Procedures. That rule sets forth the general circumstances under which a signatory agency would take enforcement action based on a finding of adverse impact.

To give such broad discretion to contractors in terms of when goals are necessary could have a chilling effect on affirmative action. We suggest as an alternative that a statistical test of significance at the 95% level be used to provide contractors with a reasonable standard for knowing when to establish goals. This standard would meet the definition of "reasonable" goals used by the Commission Guidelines on Affirmative Action Appropriate Under Title VII (29 C.F.R. 1608). The Department may desire to supplement that rule by also adopting an 80% rule of prosecutorial discretion with regard to goal achievement to conform its policy on enforcement under the affirmative action regulations to its enforcement policy under the Uniform Guidelines on Employee Selection Procedures.

11. OFCCP Proposes Deletion of Provisions Allowing for Union Notification of Findings of Violation and Union Participation in Conciliation Discussion. The proposed regulations would eliminate sections which provided for notification to unions of findings of violations and invitations to unions to participate in conciliation discussions relevant to provisions of an existing collective bargaining agreement. The proposed deletion of these sections, of course, simply reinstates the status quo prior to the December publication of final regulations.

We are concerned that the Department's deletion may be misread to discourage creative solutions by unions and management to the problems of discrimination and to sound affirmative action planning. The Commission, on April 1, 1980, issued a resolution which encourages the voluntary efforts of unions and employers to eliminate discriminatory employment practices. We suggest that, in the Preamble, the Department encourage labor and management to participate collectively in achieving the goals of your program.

Procedural Matters

We now would like to direct your attention to several serious procedural matters related to the development of and proposed issuance of this NPRM. Members of your staff have worked most diligently to reform the contract compliance program and make it cost-efficient. We are supportive of these efforts and note the following because our experience has been that an open, intelligent dialogue concerning program change enhances the final product and need not take an excessive period of time.

Contrary to the mandates of Executive Order 12067, EEOC coordination regulations (29 C.F.R. 1690), and customary practice, the Department did not consult with the Commission "during the course of development" of this proposal. As a result, our staff was unable to provide comment and analysis at the stage of development when such comment and analysis would have been most helpful to Department of Labor staff. Undoubtedly, had we been allowed to review earlier drafts of the NPRM, many of the differences which appear to exist between our two agencies would have been resolved by now. Similarly, early consultation would have facilitated our response to the request for comments and obviated the need for us to request an extension of the review period to analyze this lengthy and complex proposal. While we have expedited our review process and held a special meeting of the Commission to prepare these comments in the rigid time frames set by your staff, we hope that in the future the more collegial and efficient practice of early and full consultation will once again become the rule.

Section II of the Preamble of the NPRM requests comments on four important aspects of the contract compliance program. No background information is provided to assist the public in commenting meaningfully on these matters. Especially because this request is a part of a detailed rulemaking, such a general request does not appear calculated to secure broad and thoughtful response. We believe that the issues involved are too significant to be treated in this offhand manner and recommend that you set forth the four matters on which public comment is solicited in a separate Advanced Notice of Proposed Rulemaking which includes a brief staff paper exploring the relevant facts and issues surrounding each matter. For example, with respect to backpay, comment should be sought on a number of issues including when backpay is appropriate in securing compliance with Executive Order 11246 and how backpay should be computed. With respect to availability, a number of studies currently exist. The Department, rather than making an open-ended request for comment, should develop a new approach, if it believes that the eight factor test is inadequate, and should seek comments on that approach.

Another item of concern related to the Department's proposed issuance is that the Preamble and the Preliminary Regulatory Impact Analysis do not attempt to identify the benefits of the contract compliance program against which the public is being asked to compare the cost. The documents are devoid of any description of the potential benefits of the rule, including those which cannot be quantified, as required by President Reagan's Executive Order on Federal Regulation (12291). The Preamble and Impact Analysis are replete, however, with details on cost saving for contractors. We do not belittle the Department's attempt to reduce unnecessary and minimally productive requirements. Indeed, as noted throughout this letter, we are most laudatory of the Department's efforts in that regard. We also recognize the need to strike a balance between cost savings to contractors and diminution of Executive order protections and their derivative benefits. Since, the Preamble and Impact Analysis generally lack analysis of the proposal's effect on the program's protections, they also do not contain a discussion of how the balance was struck, or in the words of Executive Order 12291, how potential net benefits were determined. A graphic example of the Preamble's preoccupation with the cost factor is that on page 4 it solicits public comment upon the likely cost impact of the proposals without seeking comment on the impact on reduction in benefits. We recommend that this request for comment be broadened to include an analysis of the effect of any cost savings on the protections afforded by the program and the benefits that result therefrom, and that such an evaluation be built into the Department's Preamble and Impact Analysis.

Lastly, considering the number and breadth of changes proposed, the 30 day period for public comment seems inappropriately short. When the Department requested public comment within 30 days on the proposed withdrawal of the private clubs regulation, we viewed that time frame as adequate. Now, however, the same time limit is sought for an infinitely more complex issuance, to which the Department has given little prepublication exposure. Imposition of the 30 day limit may result in truncated responses, which ultimately may undermine the acceptability of the regulation. We recommend that the Department allow 90 days for comment on this NPRM.

In closing, the Commission again applauds the efforts of the Department to sponsor major regulatory reforms in the contract compliance program. Such undertakings should result in stronger, more efficient and less costly equal employment programs, a goal of both our agencies.

As indicated earlier, the Commission desires to cooperate with the Department in the development of these regulations, and has asked me to meet with you to discuss our comments. I look forward to working closely with you and your staff on this proposal and on others in the future. In view of the urgency expressed by senior officials of the Department, I invite you and appropriate senior staff to meet with me in my office (Room 4208) at 10:00 A.M. on Monday, July 6, 1981.

With kindest regards,

Douglas J. Bieman
Acting Director
Office of Interagency Coordination

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

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OFFICE [illegible]

Honorable J. Clay Smith
Acting Chair
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Mr. Smith:

This letter provides Presidential policy guidance for preparation of your fiscal year 1983 Budget.

When the President submitted his 1982 Budget in March, he made clear that substantial additional reductions in 1983 and future year agency estimates would be necessary to assure that we would continue on the path to a balanced budget by 1984. The 1982 Budget included a commitment that we would identify an additional $30 billion in budget savings for 1983 and $44 billion for 1984.

Also, higher than expected interest rates and other developments have made it necessary that 1982 Budget requests be reduced and that, as a minimum, the targets for additional savings must be achieved for 1983 and 1984. All agencies will need to share in the reductions.

As you are well aware, the President is committed to the task of holding the 1982 deficit to $42.5 billion and to achieving a balanced budget by 1984. With the exception of a very few accounts, the President has decided to propose across-the-board 12% reductions in his 1982 Budget requests now pending before the Congress.

Also, the President has decided upon new outlay ceilings reflecting the additional budget savings necessary to achieve his goals. The enclosure contains the outlay ceilings for your agency for fiscal years 1983 and 1984. These ceilings are net of proprietary receipts.

Achieving the President's economic objectives may require reductions below the outlay planning ceilings identified in the enclosure. In addition, the final determinations on the amounts to be included in the 1983 Budget depend on factors that cannot be known with certainty now, such as Congressional action or inaction on Presidential proposals and the economic and international outlook as it will appear this fall.

The President has also decided to achieve substantial reductions in federal civilian employment starting in fiscal year 1982. You will be notified of the 1982, 1983, and 1984 targets for your agency within a few days.

It will be necessary for your agency to proceed expeditiously with revised budget requests reflecting these enclosed ceilings. Your budget requests should represent the most desirable mix of programs that can be devised to achieve the President's major policy and program objectives and the most realistic way to keep within these planning ceilings.

Your agency's budget requests reflecting the enclosed outlay levels must be received by OMB no later than October 8, 1981. Your cooperation in this effort is greatly appreciated.

Sincerely,

David A. Stockman
Director

Enclosure

Enclosure

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
(In millions of dollars)

Budget Planning Ceiling

	1983	1984
Outlays (net)...............	124	121

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

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OCT 2 1981

Honorable J. Clay Smith
Acting Chair
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Mr. Smith:

The President's decision to seek additional FY 1982 budget reductions, establish tight new outlay ceilings for FY 1983 and FY 1984, and reduce Federal employment makes it necessary to revise employment ceilings set last March for FY 1982 and to set clear targets for FY 1983 and FY 1984. Most reductions will have to occur during fiscal years 1982 and 1983 since the President has committed to achieve 1984 full-time equivalent (FTE) levels that are 75,000 below the levels that had been planned for 1982.

The targets for your agency are shown in the enclosure. These targets are subject to review and revision during the 1983 budget review process. Final employment ceilings for 1982 and 1983 will be set during that process. Until you are provided with final ceilings, your staffing plans should be based on the premise that the targets for FY 1982, FY 1983, and FY 1984 will be those specified in the enclosure and that, in some cases, they may be lower.

Sincerely,

David A. Stockman

David A. Stockman
Director

Enclosure

Enclosure

Employment Targets

Equal Employment Opportunity Commission

	Full-time Equivalent		
	FY 1982	FY 1983	FY 1984
Total employment, excluding disadvantaged youth and personnel participating in the Worker-Trainee Opportunity Program (WTOP)	3,000	3,040	2,970
Full-time permanent employment, excluding personnel participating in WTOP	2,955	2,994	2,925

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

October 8, 1981

OFFICE OF THE CHAIR

Honorable David A. Stockman
Director
Office of Management and Budget
Old Executive Office Building
17th Street & Pennsylvania Avenue, N.W.
Washington, D.C. 20503

Dear Mr. Stockman:

I have given your letters dated October 2, 1981, which provided me Presidential policy guidance for preparation of the FY 1983 Budget, very careful consideration.

My staff and I have reviewed your guidance and developed a budget within these constraints. My previous comments which were forwarded to you on October 6, 1981, state very accurately the catastrophic impact of such a drastic reduction in resources during this fiscal year and the lingering detrimental effect on the Commission's capability to resolve charges in FY 1983 and the out-years.

A copy of this letter is enclosed along with:

- a table reflecting the distribution of resources for FY 1982 (at the $140,389,000 and 3,376 SY and $123,542,000 and 3,000 SY) and FY 1983 for the reduced level of $124,000,000 and 3,040 SY;
- a summary of the impact that these proposed resource levels will have on charge inventory (charges we are unable to process) by sub-program;
- a revised set of workload tables; and
- a revised Object Classification table.

I am available and will be glad to provide you any additional information that may be requested.

Sincerely,

J. Clay Smith

J. Clay Smith, Jr.
Acting Chairman

Enclosures

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF THE CHAIR

October 6, 1981

Honorable David A. Stockman
Director
Office of Management and Budget
Old Executive Office Building
17th Street & Pennsylvania Avenue, N.W.
Washington, D.C. 20503

Dear Mr. Stockman:

We have been advised that our previously approved FY '82 budget of $140 million will be reduced by 12 percent, or $17 million to $123 million. We urge that before you make a final decision on this matter, you consider the potential impact that such a severe reduction would have on the Commission.

A reduction of this magnitude occurring right after a recently completed agency-wide reduction-in-force of 287 positions, and an absorption of increases in operating support costs, would seriously weaken the Commission' ability to meet its statutory and programmatic responsibilities and commitments. The following paragraphs support this assessment.

Of the previously approved level of $140 million, $96 million was to be expended for personnel compensation, $18 million for Fair Employment Practices Agency grants, $16 million for fixed operational support expenses, and $10 million for critical program-related expenses. Having reviewed a number of comprehensive alternatives modifying this set of assumptions, the Commission finds that it has limited flexibility. In the area of staff, for example, our analysis reveals that the $6.8 million severance and unemployment compensation costs associated with a reduction-in-force will minimize the net savings. Fair Employment Practices Agency program funds are earmarked and therefore, cannot be used for other purposes. Operational support costs such as space, telephone and postage are controlled by the General Services Administration. Thus, the Commission will be forced to absorb the bulk of its $17 million reduction through sizable decreases in critical program-related costs such as case processing, litigation support, essential travel, and data processing services.

The collective impact on operations will be: (1) an inability to process the Title VII, Age Discrimination in Employment Act (ADEA), and Equal Pay Act (EPA) complaint inventories within a reasonable timeframe; (2) a dramatic reduction in the number of cases filed for litigation; and, (3) reduced efficiency in the critical staff functions of policy directio program guidance, coordination, and monitoring and evaluation of the Commission's charge processing and litigation programs.

Our major concern is that the Commission's inventory of Title VII complaints will grow by over 65 percent, from 37,000 complaints, or 8-1/2 months of workload to 62,200 complaints, or 12 months of workload during FY '82. Similarly, the Fair Employment Practices Agency inventory will rise from 36,000 complaints to 48,000 complaints. Moreover, without adequate resources, the Commission will not be able to eliminate the pre-1979 Title VII backlog by the end of 1983 as planned. In addition, ADEA complaints will rise by over 50 percent to 10,000 complaints, or a 13-month inventory by the end of FY '82; EPA complaints will rise by 40-45 percent to 2700 complaints, or a 15-month inventory by the end of FY '82.

In the past, the Commission has been heavily criticized by the Congress and the private and public sectors for not eliminating its Title VII backlog and thus, stretching out the charge processing timeframes. To address this issue, the Commission has already restructured its organization and has overhauled its charge processing procedures. As a result, charges are now settled, on the average within 115 days. The negotiated settlements success rate is nearly 45 percent nationwide. Individual remedies amounte to over $59 million during the first nine months of FY '81.

This rapid charge approach has been applauded and supported by business ar protected classes because swift processing lessens the burden on employers and provides reasonable remedies to charging parties. The system has work so well that other government agencies which have similar responsibilities have adopted these procedures. In recognition of the development and implementation of these workload management and processing systems and procedures, OMB praised EEOC's overall managerial effectiveness in its management publication. Further, in its January, 1981 report, the Government Accounting Office (GAO) noted a high level of employer satisfaction with the Commission's expedited charge processing procedures. Seventy-three percent of employers were satisfied with the procedures used by the Commission to investigate charges; 72 percent overall were satisfied with the way complaints were resolved.

These dramatic improvements have benefitted all of the parties concerned; however, the Commission would be hard-pressed to effectively deliver its essential services at the proposed reduced level. Under these constraints it will take the Commission a year to address a charge, as contrasted with the present six month figure. Every analysis the Commission has conducted shows that without speedy resolution, there is little likelihood of settlement. Moreover, the Commission, under law, must investigate a case if it does not settle; thus, delaying final resolution even further.

Another concern is that the Commission will have to abolish a large number of field offices across the country. Many are located within our major cities and, therefore, serve a large segment of the American people. Such a cutback would further hinder the Commission's ability to process charges in a timely manner and will probably result in more independent court suits being filed by charging parties. This workload will become an additional burden to already overloaded court dockets, thereby shifting the costs from this agency to the courts which are not prepared to accept this burden.

With respect to the Commission's litigation program, additional cuts will force the Commission to release legal staff and dramatically reduce litigation support funds. From an original projected need of $3.4 million to fund current cases pending in federal courts, and a modest docket of new cases, the current projection would amount to $2.2 million, or 1/3 less funds for litigation support and a corresponding reduction in staff. Nearly 1/2 of these funds are needed immediately to pay for pending litigation support contracts generated by some of our largest and most complex cases. At the reduction budget level, the number of cases the Commission could file would be reduced by 40-45 percent from FY '81.

Currently, EEOC has more than 800 cases in litigation. They represent enforcement actions under Title VII, Age Discrimination in Employment Act and Equal Pay Act. Approximately 1/3 of these cases are class-action suits. The development of most of these cases will be seriously underfunded, affecting the relief for those who are protected by these statutes

In conclusion, a budget reduced by the amount being contemplated for EEOC would significantly impair the Commission's charge processing and litigation programs and as such, would have an adverse impact on the business community and on minorities and women who have filed charges. Employers would have to retain records and maintain active case files for a prolonged period of time at great expense. Relief for those charging parties whose charges have merit would be irreparably delayed and jeopardized The court system would become intolerably backlogged with cases which would otherwise be settled at the administrative level. State agencies would also be burdened with a huge backlog. If the complaint processing system and enforcement mechanisms are adversely affected, the ability to obtain voluntary compliance would be seriously impaired.

In the family of agencies, EEOC is a small unit of the republic. Its mission is to enforce the law in cases where various forms of discrimination exist in the workplace. The proposed reduction in the Commission's budget will send a signal to the American people that EEOC will be unable to enforce the law whenever the business community violates the prohibitions against discrimination. We do not believe that this signal should be sent — however, unintentional. Hence, the Commission requests that if a reduction in our FY '82 budget occurs that it not exceed 5%.

Sincerely,

J. Clay Smith, Jr.
Acting Chairman

cc: Commissioner Armando M. Rodriguez

bcc: Issie Jenkins, Acting Executive Director
Al Golub, Deputy Executive Director
Odessa Shannon, Acting Director, OPP&E

Revised FY 82/83 Program Budget
($ in thousands)

		FY 1982 Request ($000)	Revised FY 82 Request ($000)	FY 1983 Request ($000)
I	**Policy & Executive Direction:**			
	Budget Authority	8,311	7,314	7,340
	Staff Years (FTE)	182	160	160
II	**Enforcement:**			
	Budget Authority	107,773	99,558	100,973
	Staff Years (FTE)	3,047	2,715	2,755
	o State & Local Grants			
	Budget Authority	19,000	12,000	11,000
III	**Program Support & Administration:**			
	Budget Authority	5,305	4,670	4,687
	Staff Years (FTE)	147	125	125
	TOTAL EEOC			
	Budget Authority	140,389	123,542	124,000
	Staff Years (FTE)	3,376	3,000	3,040

Summary of Charge Inventory

EEOC Sub-Program	1982 End of The Year Inventory $140 mil. Level	 $123 mil. Level Revised	 Inventory Increase 1/	1983 End of The Year Inventory $135 mil. Level	 $124 mil. Level Revised	 Inventory Increase 2/
Title VII - New Charges	36,300	48,000	8.5 mos. to 10.5 mos.	44,400	59,200	9.5 mos. to 13 mos.
Title VII - Old Charges	6,300	13,100	N/A	0	10,000	N/A
ADEA	7,300	9,700	9.5 mos. to 12 mos.	8,100	11,000	10 mos. to 13.5 mos.
EPA	1,900	2,500	11 mos. to 14 mos.	1,800	2,400	10 mos. to 14 mos.
Federal Complaints (Hearings)	2,500	3,600	10 mos. to 14.5 mos.	2,500	4,000	10 mos. to 16 mos.
State and Local	35,600	47,100	10 mos. to 13 mos.	38,000	61,500	10.5 mos. to 17 mos.

1/ This column shows the inventory for FY 82 at the $140 million, 3,376 staff year level and how the FY 82 inventory increases if EEOC resources are restricted to $123 million and 3,000 staff years.

2/ This column shows the inventory based on FY 82, $140 million and FY 83 at the $135 million and 3,308 staff year level and how the inventory increases with EEOC resources being reduced to $124 million and $124 million and 3,040 staff years for FY 83.

TABLE 3

Charge/Complaint Receipts

	1981	1982	1983
EEOC			
Title VII	47,100	50,500	54,300
Age	8,700	9,300	9,900
Equal Pay	800	800	800
Concurrent Title VII/Age	1,300	1,400	1,500
Concurrent Title VII/Equal Pay	1,000	1,000	1,000
TOTAL	58,900	63,000	67,500
State and Local Agencies			
Title VII	35,700	36,500	37,400
Age	2,500	2,600	2,700
Concurrent Title VII/Age	800	900	900
Concurrent Title VII/Equal Pay	300	300	300
TOTAL	39,300	40,300	41,300
GRAND TOTAL	98,200	103,300	108,800

TABLE 4

TITLE VII NEW CHARGE PROCESSING: WORKLOAD AND WORKFLOW

	1981	1982	1983
Charges in Process	23,600	29,000	48,000
Charges Received for Processing	46,200	50,300	54,600
Charges Closed	42,200	32,500	44,000
Charges Forwarded [1]	29,000	48,000	59,200
Charge Inventory (Months)	7½	10½	13
Benefits			
Total People	41,300	26,400	34,600
Dollars ($000)	$53,700	$34,300	$45,000
Average Dollar Benefit	$ 4,100	$ 4,100	$ 4,100

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[1] Includes charges initially completed by FEP Agencies, but rejected and subsequently investigated and closed by EEOC.

TABLE 5

EEOC TITLE VII BACKLOG CHARGE PROCESSING: WORKLOAD AND WORKFLOW

	1981	1982	1983
Charges in Process	35,000	15,900	13,100
Charges Closed	18,400	3,100	3,200
Charges Forwarded [1/]	15,900	13,100	10,000
Benefits			
Total People	2,300	300	250
Dollars ($000)	$ 5,800	$ 1,000	$ 700
Average Dollar Benefits	$ 3,100	$ 3,100	$ 3,100

[1/] Reflects charges initially completed by FEP Agencies, but rejected and subsequently investigated and closed by EEOC.

TABLE 6

ADEA CHARGE/COMPLAINT PROCESSING: WORKLOAD AND WORKFLOW

	1981	1982	1983
Charges/Complaints in Process	5,100	6,600	9,700
Charges/Complaints Received for Processing	9,200	8,900	9,500
Directed Investigations Initiated	100	200	200
Charges/Complaints Closed	7,800	6,000	8,400
Charges/Complaints Forwarded	6,600	9,700	11,000
Charge/Complaint Inventory (Months)	8½	12	13½
Benefits			
Total People	2,200	1,600	2,100
Dollars ($000)	$15,800	$11,200	$15,000
Average Dollar Benefit	$ 9,500	$ 9,500	$ 9,500

TABLE 7

EPA COMPLAINT PROCESSING: WORKLOAD AND WORKFLOW

	1981	1982	1983
Complaints in Process	2,100	2,000	2,500
Complaints Received for Processing	1,600	1,600	1,600
Directed Investigations Initiated	400	500	500
Complaints Closed	2,100	1,600	2,200
Complaints Forwarded	2,000	2,500	2,400
Complaint Inventory (Months)	12	14	14
Benefits			
Total People	1,650	1,000	1,400
Dollars ($000)	$3,200	$2,000	$2,700
Average Dollar Benefit	$2,000	$2,000	$2,000

TABLE 8

LEGAL ENFORCEMENT

	1981	1982	1983
Administrative Process			
Cases Initiated [1/]	1,356	1,000	1,000
Legal Process			
Suits Authorized	433	280	250
Consent Decrees and Settlements	228	150	150
Benefits ($000)	$14,000	$11,000	$11,000

[1/] Includes charges/complaints, directed investigations (ADEA and EPA) and Commissioner Charges (Title VII) which because of their class issues are targeted for a litigation oriented investigation.

TABLE 9

ANALYSIS OF PRODUCTION AND RESOURCE UTILIZATION
TITLE VII, ADEA AND EPA

	Charges/ Complaints Received	Charges Processed Through Fact Finding	Continued Investigations/ Conciliations Completed	Backlog Charges Closed	ADEA Charges/ Complaints Closed	EPA Complaints Closed
FY 81						
Workload	58,900	35,800	7,300	18,400	7,800	2,100
Staff Years	222	451	128	160	96	67
Production Rate	265.3	79.4	57.0	115.0	81.3	31.3
FY 82						
Workload	63,600	27,300	5,600	3,100	6,000	1,600
Staff Years	226	436	119	42	94	61
Production Rate	281.4	62.6	47.1	73.8	63.8	26.2
FY 83						
Workload	67,500	37,700	8,200	3,200	8,400	2,200
Staff Years	235	458	125	32	99	64
Production Rate	287.2	82.3	65.6	100.0	84.8	34.4

TABLE 10

FEDERAL COMPLAINT PROCESSING: WORKLOAD AND WORKFLOW

	1981	1982	1983
Hearings			
Cases in Process	2,650	2,500	3,600
Cases Received	2,850	3,000	3,000
Cases Completed	3,000	1,900	2,600
Cases Forwarded	2,500	3,600	4,000
Appeals			
Appeals in Process	1,900	2,200	2,900
Appeals Received	2,800	3,200	3,600
Appeals Resolved	2,500	2,500	2,600
Appeals Forwarded	2,200	2,900	3,900

TABLE 11

ANALYSIS OF PRODUCTION AND RESOURCE UTILIZATION
FEDERAL SECTOR

	Hearings Completed	Appeals Resolved
FY 81		
Workload	3,000	2,500
Staff Years	85	29
Production Rate	35.3	86.2
FY 82		
Workload	1,900	2,500
Staff Years	67	26
Production Rate	28.4	96.1
FY 83 *		
Workload	2,600	2,600
Staff Years	67	26
Production Rate	38.8	100.0

TABLE 12

STATE AND LOCAL AGENCY CHARGE PROCESSING: WORKLOAD AND WORKFLOW

	1981	1982	1983
Charges in Process	37,200	38,100	47,100
Charges Received for Processing	41,200	42,800	43,100
Charges Closed	40,000	30,000	28,000
Charges Forwarded 1/	36,100	47,100	61,500

1/ Reflects charges initially completed by State and Local Agencies, but rejected and subsequently investigated and closed by EEOC.

Object Class
Crosswalk — FY 81 to FY 83 Request
($ in thousands)

	FY 1981 Actual	FY 1982 Request	Adjustments to Revised '82	FY 1982 Revised	FY1983 Reques
Staff Years	3,600	3,378	(378)	3,000	3,040
Personnel Compensation & Benefits	95,232	92,088	(5,956)	86,132	85,272
Travel	3,300	3,817	(817)	3,000	3,000
Transportation	221	100	125	225	100
Rent Communications & Utilities	13,571	15,123	(2,026)	13,097	15,535
o SLUC	(6,894)	(7,685)	(-991)	(6,694)	(8,632
o Other Rent Communications	(6,677)	(7,438)	(-1,035)	(6,403)	(6,903
Printing & Reproduction	397	457	(114)	343	343
Other Services	7,978	8,328	(525)	7,803	7,803
Supplies	1,329	1,251	(409)	842	842
Equipment	356	225	(225)	100	100
Grants	18,000	19,000	(7,000)	12,000	11,000
**TOTAL EEOC	140,584	140,389[1/]	16,847	123,542	124,000

[1/] The absorption of $3,735,500 for the FY 82 Pay Raise would require the deferrment of funds to support 132 Staff Years or other programmatic activities

NAM
National Association
of Manufacturers

RANDOLPH M. HALE
Vice President and Manager
Industrial Relations Department

October 22, 1981

The Honorable Augustus F. Hawkins
Chairman
Subcommittee on Employment Opportunities
Room B-3464
Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Hawkins,

The National Association of Manufacturers ("NAM") appreciates this opportunity to share with the Subcommittee the views and experiences of its members regarding the Office of Federal Contract Compliance Programs ("OFCCP").

The NAM is a voluntary business organization with over 12,000 member companies located in all parts of the country. The NAM membership accounts for approximately 75 percent of the nation's manufacturing output and 80 percent of the members are generally considered to be small businesses. NAM also has an affiliation with 158,000 businesses through its Association Department and the National Industrial Council. NAM members support principles that encourage individual freedom, advancement of economic opportunities to all individuals without regard to race, sex, religion, national origin, age or physical or mental handicap. It is on behalf of our membership that we submit these comments.

At the inception of the current Executive Order program in 1965, affirmative action meant those measures taken to ensure nondiscrimination in the work forces of employers doing business with the federal government. The sixteen (16) years since have been a period of ever-increasing regulatory abuse which has severely clouded the original intent of Executive Order 11246.

The regulations promulgated by the OFCCP have emphasized numbers and format rather than content. These regulations have deterred real affirmative action and equal employment progress. The complexity and bureaucratic nature of OFCCP's system has caused it to be concerned more with enforcing the agency's technical requirements than with helping contractors achieve meaningful affirmative action hiring and promotion results. The focus of affirmative action enforcement has shifted from prospective improvement to an adversarial relationship. An example of this combative atmosphere is the case of the Firestone Tire and Rubber Company, in which the agency attempted to debar a major federal contractor because of a disagreement over a minor technicality that had little bearing on the company's practical affirmative action effort. In fact,

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in district court, the OFCCP conceded that it had found no evidence of discrimination at the facility involved. This type of attitude generates an enormous amount of unnecessary friction and hostility between OFCCP and contractors even though cooperation is critical for success in making any effective improvements in employment opportunities for underutilized groups.

The present affirmative action program requirements contribute little to the development of real equal opportunities for women and minorities. Company time and resources are consumed in producing meaningless paperwork and in arguing with the OFCCP over format and the relevance of required information, rather than substance.

These burdensome requirements divert management's attention from areas where greater equal employment efforts could be made, such as locating and remedying internal selection processes which may be biased, or making greater efforts to locate and hire qualified minorities and women. Resources which are now diverted to unproductive recordkeeping and numerical manipulating would be better spent on providing education and training programs that could enhance the marketable job skills and promotional opportunities of women and minorities and could encourage underutilized group members to pursue careers in nontraditional jobs. A recent study by the Equal Employment Advisory Council indicates that federal contractors spend $1.15 billion annually on complying with OFCCP requirements. The average cost of a single OFCCP compliance review for a large facility exceeds $20,000. In contrast to these considerable expenditures, largely for paperwork and responding to OFCCP's request for data, the agency itself has stated that only four percent of its compliance reviews yield evidence of actual discrimination. Thus it appears either that the agency is targeting employers who have good affirmative action programs or that it is not succeeding in discovering such discrimination as may exist. The process currently required rarely yields results which justify its use and should be eliminated. A well-organized targeting approach to reviews for recalcitrant contractors would produce the desired results. In light of these facts, it is apparent that large amounts of money are being wasted on meeting hypertechnical requirements, rather than being spent on constructive affirmative action programs, such as education and training, that would actually increase employment opportunities for underutilized groups.

The following points summarize the highlights of our chief concerns relating to the improvement of OFCCP's administrative efforts to enforce E.O. 11246:

Back pay. The OFCCP's efforts to obtain back pay have also been the cause of much concern and debate over the past ten years. We cannot emphasize strongly enough that there is no provision of Executive Order No. 11246 that authorizes OFCCP to impose or seek to obtain back pay, front pay, or any other type of individual relief. In developing regulations, OFCCP has ignored the Executive Order, Congress' mandate in Title VII and relevant case law. (It should be noted that OFCCP's regulations did not even refer to back pay until 1977, almost twelve years after Executive Order No. 11246 became effective.) In evaluating the various legal bases for OFCCP's position on the issue, it is initally noted that neither the purpose of the Executive Order nor basic contract principles justify the creation of a back pay remedy. In a broader sense, the Executive Order's intent is to support public policy in this area. It is designed to enlarge the available labor pool of qualified workers. All back pay claims should be processed through the EEOC; Congress indicated its intent that this form of remedy be handled there. Individual relief under the Executive Order is not necessary to effectuate the Order's purposes. OFCCP's success should not be calculated in terms of back pay extracted from contractors.

Of course, in one sense Congress may share some of the responsibility for the OFCCP's emphasis on back pay recovery, since a traditional measure, in oversight hearings, of an agency's effectiveness in combatting employment discrimination has been the amount of monetary relief obtained. We would suggest that a more appropriate yardstick would be to judge the increase in the numbers of jobs available to minorities and women.

Job Groups. The present OFCCP approach to job groups is often artificial and meaningless to contractors. The job groups are often too small or fail to reflect a contractor's organizational and occupational structure. Contractors should be permitted to do the utilization analysis on the basis of a job group classification system that truly reflects internal work force realities, with EEO-1 categories relected in the job groups where relevant. If a contractor's job grouping appears to reflect accurately the company's work content, pay or lines of promotion, the OFCCP should not engage in endless exercises of restructuring job groups to create a finding of underutilization.

Availability. We believe the present requirements under availability contribute little to the development of equal opportunities for women and minorities. While the regulations have never actually defined availability, the OFCCP has stated in its compliance manual that "availability" is the percentage of minorities and females who have the requisite skills for a job group or who are capable of acquiring them. Contractors usually define availability in terms of those minorities and/or women who have the requisite skills in the area in which the contractor can reasonably recruit. Therefore:

1. The eight availability factors should be replaced by two factors:

   a. The availability of women and minorities having requisite skills in the area in which the contractor can reasonably recruit based on the 1980 Census Data. This census data would be the most reliable and up-to-date demographic information available.

   b. The availability of promotable and transferable women and minorities within the contractor's organization.

2. The OFCCP should abandon efforts to set numerical goals based upon "future" availability. Consideration should be given to the Final Report on Availability Analysis prepared for the Department of Labor by Abt Associates, Inc.

This report admits that after long and careful analysis they were unable to develop a viable method of calculating potential or future availability.

Show-cause notices. Another area where present procedures are not working and are having a negative effect is found in the present conciliation procedure and use of show-cause notices, with the latter becoming a routine practice, often prior to an on-site review. Discriminatory, not technical, allegations should be specific so that recommendations for corrective action can be made. They should not be subject to change at the whim of an individual compliance officer as is often the case, creating adversarial rather than cooperative positions. Effective use of administrative law judges should be expanded to increase resolution of factual differences.

OFCCP organizational structure. The present organizational structure of the OFCCP makes effective administration of the Executive Order impossible. There is little guidance or control from the OFCCP policy makers at national headquarters to the regional field offices. This makes it extremely difficult for contractors to deal or confer with OFCCP headquarters on matters of high-level policy or to obtain uniformity of programs that cross more than one of the ten regions. Additionally, inconsistent field application of regulations compounded by differing interpretations of the OFCCP "Federal Contract Compliance Manual," has created wide variances in what is expected of contractors in program format and in the manner of conducting compliance reviews. It is not uncommon for large regional or national contractors to experience grossly inconsistent demands from several different OFCCP Area Offices.

For example, a member company was told during a review that the eight-factor analysis method of determining availability must be used, unless the former Company's own method resulted in a higher availability rate. In other words, the method was irrelevant; only the increase in the availability rate was important. When a high-level headquarter OFCCP official was asked about this rather dubious approach to availability, he replied in essence, that there was little the headquarter staff could do about such aberrant behavior. This very frustrating and complex system relates only to a program OFCCP has created for itself, thus completely alienating the business community. It is recommended that the OFCCP be restructured so that the Assistant Regional Administrators report to the Directors in headquarters responsible for compliance activities.

In conclusion, it should be restated that the concept of affirmative action is based on the objective of assisting minorities and women in overcoming historic barriers to equal access and equal opportunity in all aspects of employment. NAM believes that the government agencies should redirect the time and effort now spent on excessive regulatory considerations to providing employers with better guidance in their prospective efforts to provide equal employment opportunity. We believe that the competition between the EEOC and OFCCP for remedial action has certainly been counterproductive. The Executive Order No. 11246 governing the OFCCP was not intended to go beyond Congress' statements in this area in Title VII, nor to expand substantive rights or give the Executive branch a shortcut around the procedural safeguards of Title VII. The purpose of the Order is clear: it was intended to encourage federal contractors to devise creative programs aimed at ensuring non-discrimination in employment. Affirmative action, properly structured, regulated, and enforced has many benefits in strengthening human resources and the social fabric of the nation. It provides for equal opportunities in employment which American industry has and will continue to actively support.

Sincerely,

Randolph M. Hale

Randolph M. Hale
Vice President
Industrial Relations

cc: Hon. William Clay (D-MO)
Hon. Harold Washington (D-IL)
Hon. Ted Weiss (D-NY)
Hon. Baltasar Corrado (Del.-PR)
Hon. Paul Simon (D-IL)

Hon. Millicent Fenwick (R-NJ)
Hon. Thomas E. Petri (R-WI)
Hon. James M. Jeffords (R-UT)

TUCSON WOMEN'S COMMISSION
1515 E. Broadway
Tucson, Az. 85719

October 4, 1981

Honorable Augustus F. Hawkins
Chairman
Subcommittee on Employment Opportunities
Committee on Education and Labor
United States Congress
B-346-A Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Hawkins:

Thank you for your invitation to submit testimony before the Subcommittee on Employment Opportunities.

I am pleased to enclose testimony for consideration by your committee.

Thanks to the 11th Annual Far West Regional Conference on Women and the Law which I am currently attending, I have been able to borrow an old typewriter to prepare this testimony and mail it to you before the October 10 deadline.

I will be pleased to answer any questions your committee might have regarding my testimony. I may be reached at (602) 624-8318.

Sincerely,

Alison M. Hughes

Alison M. Hughes
Executive Director

TESTIMONY ON AFFIRMATIVE ACTION
PRESENTED TO THE HOUSE
SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

by
Alison M. Hughes, Exec. Dir.
Tucson Women's Commission

Background Information

As executive director of the Tucson Women's Commission, I have been involved in a variety of employment issues focusing on the needs and problems of women. To name a few:

1. Our Commission has a working agreement with the Arizona Civil Rights Division. We are an intake agency which processes complaints on the basis of sex to regulatory agencies such as EEOC, OFCCP, Wage and Hour Division of DOL, State Civil Rights Division, City of Tucson Human Relations Division, and NLRB .
2. Almost two years ago TWC established a pre-apprenticeship program to prepare women for careers in construction fields. The program was funded through CETA.
3. We established an employment preparation program for women in our county jail, fully supported by the jail administration. The project was funded through CETA and ended with the CETA budget cuts.
4. I am a co-founder of Arizona Tradeswomen,Inc., an organization of women in the trades which supports its members and encourages women to enter careers in construction fields.
5. I have served for two years on the County CETA Planning Council and am a member of the Executive Committee of that Body.
6. Every two years, through TWC, I organize a seminar on employment discrimination law. The seminar is geared primarily to attorneys and EEO representatives from public and private agencies. Its purpose is to present information on legal trends and interpretations of protective legislation.

PRESENTATION REGARDING AFFIRMATIVE ACTION

Executive Order 11246

Only after the Executive Order was amended in 1978 to mandate goals and timetables for the entry of women in construction fields did these fields open up to women.

Prior to the adoption of the goals and timetables Arizona's construction trades were composed of 99.9% males. Since their adoption much progress has been made. For example;union statistics show:

May, 1979: 141 women entered Arizona apprenticeship programs
August 1980:171 women " " " "
August 1981:265 women " " " "

With the August 1981 figures, Arizona's unions met their overall goal of admitting 6.5 percent females into apprenticeship programs.

While the major unions have done a commendable job of recruiting women, the construction industry has not been as enthusiastic in their recruitment efforts.

A review of the State Office of Federal Contract and Compliance Program's computer printouts for June 1981, reporting Arizona construction contractors' employee counts, shows the following:

	Minorities	Women
Electricians..............	12.9%	1.2%
Tile layers...............	17.1	0.0
Carpenters................	19.5	1.7
Sheetmetal................	20.5	0.6
Iron Workers..............	23.0	0.0
Painters..................	24.8	3.0
Plumbers..................	25.1	1.6
Teamsters.................	30.6	2.5
Operating Engineers.......	31.3	2.4
Plasterers................	32.1	2.2
Laborers..................	38.4	2.0

The above figures show that construction companies with federal contracts have done well in the hiring of minorities (males) into construction jobs. They have not hired females to the extent that they should or could have hired them.

Arixona contractors complain that there is not an available pool of women to hire. They complain that the goals and timetables are unreasonable. Says Jeffrey Baker of the Associated General Contractors in Tucson in a letter to me in November 1980 (copy enclosed):

> "The U.S. Department of Labor's Office of Federal Contract Compliance Programs is illegally, aggresively, and inflexibly enforcing a quota system that has been, since its inception, incapable of achievement because other DOL regulations limit the number of people who can be trained in the construction industry. AGC told the Department at the beginning of the Women in Construction Program that the goals could not reached given existing training regulations."

The AGC opposes goals and timetables, I believe, because they simply do not support the idea of women working in the construction trades, During the time we implemented our pre-apprenticeship program at the Commission, we learned that the AGC accepts applications for employment from construction workers. They operate a job referral program on an informal basis. Not once did they work to place any of the women we referred to them for jobs. (We were successful in placing a few women directly into non-union construction companies.)

It should be pointed out that Arizona is a right-to-work state. Not all construction companies have union contracts. This is why we worked with unions as well as with AGC and individual contractors. This fact may be part of the reason that the statistics show low affirmative action gains of women in construction. In other words, those companies with union contracts have the advantage of hiring women in the apprenticeship programs, because the unions have aggressively searched for women. Companies that are non-unions do not have a pool of women from which to hire.

However, we are also aware of how the hiring system works. Sometimes when a company calls the union hall, informal "working agreements" result in a specific person being sent on the job. The union representatives know which companies will take women and which one won't. To maintain good working relationships they comply. This is simply the politics of the job which is prevalent on a nation-wide basis.

It is apparent to me that goals and timetables must be retained if women are to continue to make headway in construction jobs. Change occurs gradually, and I believe the continuation of affirmative requirements will eventually result in our seeing more women hired into construction jobs in our state.

Who and Where are Arizona's Tradeswomen (The Availability Pool)

The pool of women available to work in construction is varied. Arizona Tradeswomen, Inc. is composed of women who are carpenters, plumbers, surveyors, operating engineers, etc., who had previously worked as teachers, researchers, waitresses, secretaries, etc. Their ages are between 20 and 45. They enjoy being in the trades and recognize that they are pioneers in their fields. To this end, they are committed to helping other women to enter the trades. They speak in the public schools fully recognizing that they serve as models for young women who have never before seen a "woman plumber" or a "woman carpenter."

I have heard them share stories of sexual harassment and sexist attitudes toward them on the job, on the part of their male collegues. They provide support systems for each other, and help each other strategize techniques of solving on-the-job problems like this.

Initial funding to help establish Arizona Tradeswomen came through the Women's Bureau of DOL.

Literally hundreds of Tucson women have attended workshops sponsored by the Commission on how to enter the trades. Since February 1977 the Commission has provided at least seven such sessions in our community.

Obviously women are interested in exploring new career opportunities. The main reasons women give me for entering construction work are twofold: (1) they prefer working outside to being in an office, and (2) the pay is good.

Many women who attend our workshops are there out of curiosity. After learning what the jobs are like they know the work is not for them. Others want to experiment. Pre-apprenticeship programs such as the one we offered are critical. They help women to determine if they want to commit many years of their lives to the hard work required in construction. Many become demoralized, however, once they make the commitment and are unsuccessful in their attempts to find employment.

One sure success story is worthwhile citing. Fran Heron, age 41, moved to Tucson from Chicago where she worked for years as a proofreader. She wanted a new career and attended one of TWC's workshops on how to enter apprenticeship programs. She applied and was accepted into the Carpenter's Union program. At 43 she is now in her second year as an apprentice, Is an active member of Arizona Tradeswomen, and is considered an excellent apprentice.

Based on my experiences with women in the trades, I disagree wholeheartedly with construction contractors who maintain that they cannot find women to work in construction, and that there is not an available pool of women for construction work. Like all things in life, one must make a good faith effort if one is to succeed.

SEX DISCRIMINATION COMPLAINTS AND OFCCP

Sex discrimination in the workforce remains high, especially in the construction industry and othernontraditional areas where women are being hired.

Each year the Tucson Women's Commission processes over 120 complaints to appropriate regulatory agencies. Here are two examples of the types of complaints we receive:

- A young woman applied for an apprenticeship plumber position with a large construction company (non-union) which is working on a new shopping mall in Tucson's northwest area. She was told by the foreman she could start work the next day. The foreman was new. When she showed up for work she was told by the secretary she was not hired because the company does not hire women in construction jobs. She sought out the man who hired her, and he apologized because, as he said, he didn't know the rule on women on the job. She attempted to talk with the foreman's boss, but could get no farther than the secretary.
- A young woman was hired as an operating engineer by a construction company. While working the backhoe her foreman was directing her to move dirt up a hill. She argued with him that if she continued his directions her machine would get stuck at the top. He pointed out that he was the boss and made her continue on her route. She did. The machine got stuck at the top and she was fired. She believes the

> foreman deliberately forced her up the hill, knowing full well the implications, because he would then have a reason for firing her.

In cases like these we process the complaints to OFCCP or EEOC or both. OFCCP does not investigate individual complaints, however. They only investigate class action complaints. When we have reason to believe the employer is indeed discriminating against women as a class we write up the complaint on that basis and submit it to OFCCP.

I have not been particularly satisfied with HOW OFCCP handles sex discrimination complaints. Early in 1980 I complained to our state OFCCP office that the staff members were not spending enough time pursuing complaints filed against construction companies. I was visited by the then Assistant to the national director of OFCCP, Bob Villafana, when I raised this issue. He responded that it was the national office policy that staff spend 11 percent of their time investigating construction-related complaints. He added that the 11 percent quota had been met. I was left speechless.

It must be pointed out that OFCCP offices have not had large staff sizes. In Arizona there are only about 9 investigators to cover Arizona and Nevada. Nevertheless, I believe more priority could have been placed on construction company investigations, given the commitment applied in this area by former Secretary of Labor, Ray Marshall. The OFCCP staff members did tell me that their priorities lay with the mines and with university complaints.

OFCCP AND COPPER MINES

Recently I have been spending time meeting with women working at Duval, one of Arizona's largest copper mines. They are extremely dissatisfied with their working conditions, especially with the attitudes of their male colleagues toward them. I prepared to file a class action complaint with OFCCP. Our new state director of OFCCP advised me as recently as two weeks ago that Duval has no federal contracts therefore it was doubtful that our complaint would be investigated. Further I learned that Duval is the fourth Arizona copper mine that supposedly has no Federal contracts.

It is difficult for me to believe that the federal government has no contracts or subcontracts with the copper mines. Nevetheless, in order for OFCCP staff to investigate complaints, they must have a contract number.

The implications of this are serious. It means that hundreds of women in the mines do not have access to protection under the Executive Order.

Apprenticeship and Age Limits

Some of Arizona's union apprenticeship programs have age limits which especially affect women. Some examples:

	Minimum Age	Maximum Age
Bricklayers	17	27
Electricians	18	24
Operating Engineer	18	30
Teamsters	18	30

I had hoped that by the end of 1980, EEOC would pass a ruling preventing age limits in apprenticeship programs. The Commission members did review the issue and a vote was taken. Unfortunately, it failed. I was especially disappointed that Commissioner Armando Rodriguez, a friend, did not support this change.

Age limits penalize women much more than men. Unlike boys, whose early experiences prepare them for such careers as carpenters or automotive mechanics, girls have entirely different orientations in their youth. Even in junior and senior high schools today, after passage of Title IX, few girls may be seen in shop classes.

It is only when they finish high school and begin working that many young women realize that other alternatives are available to them.

Late exposure to the availability of careers in construction is thus often "too late" for Arizona's women. By the time some of them decide on their careers, the field is closed to them as they are considered "too old." It is difficult for many women to accept that they are "over the hill" at age 24 or age 30. The age limits also apply to males. But males generally know at a much earlier age if they want to be in construction, and in what field.

Yet Fran Heron, the 43 year old carpenter's apprentice, proves to us that women are perfectly capable of succeeding in the trades at a later age.

SUMMARY

Affirmative action requirements, including goals and timetables, have resulted in positive changes in the workplace. Yet employment discrimination continues against women and minorities.

It is human nature, I suppose, to rebel against forced societal change. But it took the passage of Constitutional Amendments and strong legislation to ensure desegregation of public facilities, access of minorities into our higher educational system, and appointments of minorities and women into positions of authority throughout the land.

The price of equality is eternal vigilance. We cannot permit any weakening of protective legislation . Rather, if our country is to provide its citizens with the equality and freedom promised in our Constitution, Congress must work to enact stronger laws and federal staff members must provide stronger administrative rulings.

While I cannot think of an alternative to affirmative action as we now know it, perhaps a combination of minds, brought together in conference at the national level, might examine existing procedures, share new ideas, and invent new concepts of affirmative actio and a new descriptive language which is better accepted throughout the land.

At the moment, women and minorities desperately need the protection now provided by federal laws.

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ASSOCIATED
GENERAL CONTRACTORS
OF AMERICA

November 17, 1980

Tucson Women's Commission
1515 East Broadway
Tucson, Arizona 85719

Attention: Alison M. Hughes
Executive Director

Dear Alison:

The General Contracting members of the A.G.C.-Arizona Building Chapter, have asked me to correspond to you in regards to your outreach to these firms to cooperate in helping you place women into apprenticeship or apprentice helper positions in the construction field. There are certain exteruating circumstances that I think should be brought out regarding entry of women into the construction industry. The first and foremost reason is the recessionary trend that our economy is currently facing which greatly effects the cost and building of construction projects. When there is a downturn in the economy, the construction industry is one of the first to be affected which results in layoffs or reduction in force to the labor market. With a reduction in force a contractor cannot afford to train or hire additional workforce when there are qualified craftsman waiting for job re-assignment. The multi-faceted nature of construction requires that each phase of construction be done in sequence and that there are no monies available to meet payrolls for non-existent work.

The U.S. Department of Labor's Office of Federal Contract Compliance Programs is illegally, aggressively, and inflexibly enforcing a quota system that has been, since its inception, incapable of achievement because other DOL regulations limit the number of people who can be trained in the construction industry. AGC told the Department at the beginning of the Women in Construction Program that the goals could not reached given existing training regulations. In an attempt to aid AGC's members, who are firmly committed to equal opportunity and who desire to be in compliance with affirmative action objectives, AGC presented to DOL a training program designed to increase the number of women who could be brought into the industry. That was nearly two years ago. Since then National AGC has engaged in continuous negotiations and innumerable meetings with the Department of Labor that have rivaled the working of the Paris Peace Talks on Vietnam for frustration and absurdity.

The training programs recently approved by DOL will be helpful in recruiting women for the workforce that will be needed in times to come for the construction industry. The Arizona Building Chapter of the AGC is currently looking at the DOL approved-"Unilateral Training Program" for implementation of the program in 1981 together with various other AGC training programs that will bring the construction industry qualified tradesmen in the years to come. I hope this letter has cleared the air on why women haven't been successful in placing themselves in the industry and that the AGC is committed to providing adequate training programs to assist its member firms in recruiting highly trained personnel. When the training programs are ready for implementation we will contact you for your assistance in the administration of the above-mentioned programs.

Please call on our office should you have any questions regarding this matter.

Sincerely,

The Associated General Contractors
Arizona Building Chapter
Tucson Division

Jeffery M. Baker
Administrative Assistant

JMB/krw

[From the Arizona Daily Star, Mar. 11, 1979]

Gains still small

More Rosies riveting in construction here

By BILL BANK
The Arizona Daily Star

The U.S. Department of Labor expects women to represent 5 percent of the labor forces of all Tucson construction companies by April 1.

They won't.

But the Labor Department isn't too upset about it because it appears the companies have been making "good faith" efforts to achieve the goal.

And, in fact, the director of the Tucson Women's Commission, who was a sharp critic of local firms' efforts to hire women just 4 year ago, says great strides have been made since then.

"There has been a dramatic change in attitude over the past year," Alison Hughes said last week. "There's no question that federal guidelines are feeding that change, but I see a willingness of trade people to work with us now. I'm very pleased with the spirit of cooperation."

"There is no way any contractor can meet the (5 percent) requirement," said William E. Naumann, board chairman for the Tucson-based M.M. Sundt Construction Co., which has more than 1,200 employees in several Western states. "We are at about 2.6 percent overall right now, and we are supposed to be at 3.1 percent," Naumann said.

But what the Labor Department looks for is evidence that firms are trying to comply with the goals, said Ramon Sanchez, Phoenix-area director for the office of federal contract compliance programs. Sundt employed only about 0.3 to 0.5 percent women one year ago, said Naumann, and has made significant gains.

One problem women and their potential construction employers face is that to become a journeymen requires from three to four years' experience for many trades, said Orril "Beano" Sorensen, an official with the Ashton Co. Inc.

"The interest is great among women for construction jobs," Sorensen said. "It surpassed our expectations in the Tucson area. But people often have the idea they can just come in and go right to work; they don't know you need experience."

Many women are getting that experience in apprentice programs, such as one for operating engineers who work with heavy-construction equipment. Of 43 apprentices, five (or 22 percent) are women. Federal goals suggest that such programs, which train persons for the trade, include at least 20 percent women by April 1. Most apprentice programs already have achieved that goal in Arizona, officials said.

"We are also starting a CETA program to train women specifically for the trade," said Marlin Schweigert, coordinator for the Arizona operating engineers apprenticeship and training program. "We hope to train 64 women in the next year."

The program, which began two weeks ago, includes work on the Silverbell Regional Park at the 4200 block of North Silverbell Road. Upon completion of the three-month training program, Schweigert said, the women will be qualified to start working in the field as operating engineers, although they will not have sufficient training to gain journeymen status.

But big jumps in employment rates for women in the building trades are still three or four years away, industry officials said.

Periodic checks of construction firms are done by the Labor Department, Sanchez said. And for any firms that don't

(See WOMEN, Page 3D)

Women show gains in trades

(Continued from Page 1D)

appear to be making "good-faith" efforts at compliance, the department has the authority to yank existing government contracts and withhold new ones.

This carrot-and-stick approach, combined with increased publicity about construction jobs for women, has contributed most to the improvements noted this year, Hughes believes.

"Our biggest problem now is that there is an age limit of 30 for starting in many of the trades," Hughes said. "Women who have been in the home and now want to get into the job world have limited access because of this."

Some trades, including carpenters, painters and plumbers, have eliminated age requirements, Hughes said, and the commission is working to eliminate that barrier in the other trades.

The women's commission, at 1515 E. [illegible] listing available openings for apprenticeship programs involving more than 30 crafts, Hughes said.

AFFIRMATIVE ACTION: THE REAGAN ADMINISTRATION AND THE FORCES OF REACTION*

TESTIMONY PREPARED FOR THE HOUSE
SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES
SEPTEMBER 28, 1981

JOE R. FEAGIN, Ph. D.
Professor of Sociology
University of Texas (Austin)

Affirmative action is in serious trouble in the 1980s. The white male backlash against the social progress of minorities and women began in earnest in the early 1970s, less than a decade after the 1964 Civil Rights Act. Since then the backlash has grown in significance to the point that in the 1980s it has articulate and powerful spokesmen at the highest levels of the American government. An early report of a Reagan administration transition team calls for the gutting of the Equal Employment Opportunity Commission, including a one year freeze on new court suits challenging discrimination and a thorough "reconsideration" of the philosophy of affirmative action. Recently the Department of Labor's OFCCP has proposed to change the regulations stemming from Executive Order 11246 in order to make it easier for businesses to avoid significant affirmative action surveillance by major watchdog agencies. The proposals will sharply reduce the number of companies which must develop and implement written affirmative action plans; they will enable companies with a clean slate in one compliance review to go unreviewed for five years; and they will change the concept of "availability pool" so that targeted goals can be signficantly smaller. Also proposed are changes in back pay remedies for proven discrimination cases. The Reagan administration contends that implementation of these proposals will cut down on paper work for the business community, while at the same time protecting minorities and women.

Yet these proposals have been, explicitly and in detail, rejected by the Equal Employment Opportunity Commission, the nation's top civil rights watchdog agency. And virtually all civil rights groups representing minorities and women see these OFCCP proposals as a major retreat from the federal commitment to expanding equal opportunity.

Lying behind the Reagan administration proposals are many assumptions about both discrimination and affirmative action which are in line with the assertions of conservative writers such as George Gilder and the far-right Heritage Foundation. In his new book Wealth and Poverty, the influential George Gilder has argued that there is no need for affirmative action because

> (1) it is now virtually impossible to find in a position of power a serious racist;
> (2) it would seem genuinely difficult to sustain the idea that America is still oppressive and discriminatory;
> (3) discrimination has already been effectively abolished in this country.

Race and sex discrimination are explicitly described as "myths." Affirmative action is seen as unnecessary. Gilder further suggests that affirmative action for women is a "growing mockery" that victimizes black men, the "true" victims of discrimination. Even though this argument about black men contradicts Gilder's argument that discrimination has been effectively abolished, and in spite of the undocumented and loose character of many of Gilder's arguments, this book is according to Time magazine the "bible" of many in the Reagan administration and in conservative business circles.[1] In addition, the influential report of the Heritage Foundation, titled Mandate for Leadership, argues vigorously for sharply reducing or dismantling many federal EEO and affirmative action efforts for both minorities and women: "Affirmative Action does not run counter to American practice; it runs counter to American ideals. It should be jettisoned as soon as it is politically possible to do so." Equal opportunity and affirmative action regulations are seen as destroying both government agencies and private enterprise.[2] The mass media have given considerable favorable attention to these reports. A year ago, most serious analysts of civil rights would not have predicted such a rapid acceptance of these reactionary views at the highest levels of business, government, and academia. A decade and a half of major civil rights gains may be coming to a close.[3]

It is in this societal context of reaction that my testimony is being presented. My purpose here is to examine the assumptions underlying the Reagan administration proposals, particularly the assumptions about the decline in race and sex discrimination and about affirmative action's character and effects.

HAS RACE AND SEX DISCRIMINATION DISAPPEARED?

Most government reports and court cases on affirmative action use the word discrimination, but few have given discrimination much in-depth attention. Apart from a few words about sharp declines in discrimination, most conservative critics also focus on the operation and effects of affirmative action and ignore the background and context of discrimination. An adequate defense of affirmative action requires a thoroughgoing problem-remedy approach, since it is the discriminatory problems which require the remedy. Compare the situation to that of cancer. Frequently, policymakers and other analysts have not distinguished the different types of race and sex cancers and the different types of remedies which such race discrimination and sex discrimination require. Talking about affirmative action without talking about discrimination is like assessing chemotherapy without examining the cancers involved. Discrimination is the *problem* for which affirmative action is the *remedy*. Discussions of affirmative action apart from the problems for which they are designed as solutions have an airy, abstract quality. Equal opportunity and affirmative action efforts make sense only if we understand the problems of individual and institutionalized discrimination.

Most conservative and many moderate critics of affirmative action seem to believe the cancers of race and sex discrimination have largely been eradicated. Few (no?) people who attack affirmative action believe that massive discrimination still exists. So we have prominent white males such as Nathan Glazer and George Gilder who not only reject most affirmative action but also argue that "discrimination has already been effectively abolished in this country."[4] There is no consensus on affirmative action as a remedy because there is no consensus on the character and persistence of discrimination in the United States. The decline in overt, blatant prejudice and the decline in many blatant forms of race and sex discrimination are taken by conservative critics as signs that discrimination is dead or so near death as to require little or no further societal intervention.

Race and sex inequalities are still conspicuously obvious in Census Bureau and other statistics on this society. But there is a growing chorus of critics in government, industry, and academia who challenge the use of these inequality statistics as *prima facie* evidence of discrimination. To explain such inequalities, these critics prefer to fall back on "natural" causes beyond the reach of civil rights laws and litigation. Timing and subcultural factors are often cited for minorities. These factors include the late entry of black Americans into cities, high minority birth rates, subcultural differences between young blacks and young whites, and something called "class" (subcultural differences). In the case of women, sex inequalities are said to persist because of biological (e.g., reproductive) differences, differences in aggressiveness in pursuing better-paying full-time jobs, and higher job turnover rates. Whatever the explanation, the intent is clear: to throw out the idea that white America still significantly discriminates against nonwhite America and that male America still significantly discriminates against female America.[5]

A recent Civil Rights Commission report (Affirmative Action in the 1980s) helps to counter these policy-oriented arguments about the declining significance of race and sex discrimination. However, it is only a start. What is needed in the 1980s is a major effort by the civil rights communityto demonstrate, conclusively and in detail, the extent, character, and rootedness of discrimination in this society. I will now try to provide some suggestions for this effort.

Public Opinion on Discrimination. Important signs of the continuing importance of race and sex discrimination can be seen in recent polls of blacks and women. A fall 1979 survey by the Mathematica survey research firm interviewed 3,000 black households nationwide, probably the largest such survey ever done. Two thirds of these 3,000 black heads of household felt black Americans are discriminated against "a great deal" in this country. Blacks with incomes above $20,000 were somewhat more likely to report a great deal of discrimination (70 percent) than those with incomes under $6,000 (61 percent).[6] Moreover a 1980 survey by the magazine Black Enterprise found most of their middle- and upper-income black readers to be critical of the current racial situation. Most felt a majority of black Americans had not yet become members of the "middle class." In response to the one question on a specific type of discrimination, 85 percent of the Black Enterprise readers agreed that "most lending institutions still discriminate against potential black borrowers."[7]

Black opinion is greatly different from that of rank-and-file whites. In reply to a June 1980 Gallup question, "Looking back over the last ten years, do you think the quality of life of blacks in the U.S. has gotten better, stayed the same, or gotten worse?" over half of the nonwhites in the sample (mostly blacks) said "gotten worse" or "stayed the same," compared with only a fifth of the white respondents. Three quarters of the whites said "gotten better."[8] Thus a majority of rank-and-file white Americans seem to agree with the conservative reaction of many white leaders in academia, government, and business. Black problems and disadvantages tend to be blamed on blacks themselves. Two thirds of whites in a recent NORC survey blamed black disadvantages on blacks' lack of "motivation or will power to pull themselves up out of poverty."[9] And the June 1980 Gallup opinion survey asked this question: "In your opinion, how well do you think blacks are treated in this community -- the same as whites are, not very well, or badly?" Sixty-eight percent of the whites in this nationwide sample said blacks were treated the same as whites; only 20 percent felt they were not well treated or were badly treated. The public opinion data suggest a clear polarization of the views of blacks and whites on issues of discrimination and inequality. The policy implications of these polarized attitudes are quite serious. Among other signals, the summer 1980 riot in Miami makes it clear that the price of racial injustice can be very high. In the 1980 Gallup poll (after the Miami riot), when asked about the likelihood of serious racial conflict in their local community in the future, 37 percent of nonwhites surveyed said racial conflict was likely or expressed uncertainty about the possibility.[10]

Few public opinion surveys have asked women about discrimination, but a 1980 Roper poll did ask a sample of 3,000 women some relevant questions. Six women in ten in the survey said there was discrimination against women in jobs, including three quarters of women in cities. Majorities saw discrimination in business, government, and the professions.[11] These surveys of minorities and women show clearly that substantial majorities still perceive race and sex discrimination as serious problems in this society.

Dimensions of Discrimination. The public policy debates over prejudice, discrimination, and the use of statistics are often confusing, in part because the various dimensions of discrimination are not carefully distinguished. As a first step in sorting out and advancing our thinking about discrimination, I would suggest the analytical diagram in Figure 1. The dimensions of discrimination include (a) motivation, (b) discriminatory action, (c) effects, (d) the relation between motivation and action, (e) the relation between action and effects, (f) the immediate institutional context, and (g) the larger societal context.

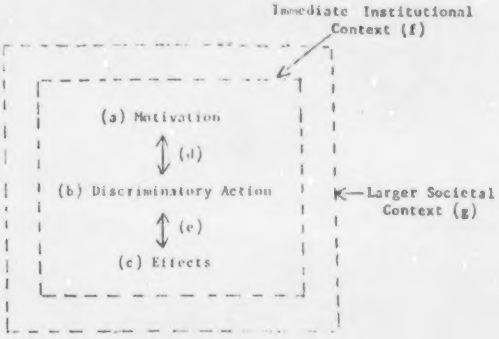
Immediate Institutional Context (f)
(a) Motivation
(d)
(b) Discriminatory Action
(e)
(c) Effects
Larger Societal Context (g)

Figure 1. The Dimensions of Discrimination

In the social science and policy literatures a few of these components have been given the greatest attention: motivation (a), effects (c), and the relation of motivation to action (d). The discriminatory practices or mechanisms themselves (b) and the larger institutional and societal contexts (f,g) have received less theoretical and empirical attention.

Motivation. Much research and discussion on discrimination has focused on one type of motivation (a in Figure 1)-- prejudice -- to the virtual exclusion of other types of motivation. Much traditional analysis also seems to emphasize the relation (d in Figure 1) between prejudice and discrimination, with prejudice seen as the critical causal factor underlying discriminatory treatment of a singled-out subordinate group.[12]

Most of the social science and policy literatures have adopted some variation of a prejudice-causes-discrimination theory. Gunnar Myrdal, in his famous study An American Dilemma, viewed racial prejudice as a complex of beliefs "which are behind discriminatory behavior on the part of the majority group."[13] But in fact discrimination involves far more than the actions of bigoted individuals. Several authors have recently pointed out that the intent to harm lying behind much discrimination may not reflect prejudice or antipathy but simply a desire to protect one's own privileges. Some discriminate because they gain economically or politically from racial and sexual restrictions on the competition. In the historical struggle over resources, systems of race and sex stratification were established in which the dominant groups benefit economically, politically, and psychologically. They strive to maintain their privileges, whether or not they rationalize the striving in terms of prejudice and stereotyping.[14]

The Effects of Discrimination. A significant proportion of the discrimination literature concentrates on the psychological and statistical effects of discrimination (c in Figure 1). There are a number of social psychological studies of the effects of discrimination on the personalities of black Americans, such as the famous Clark studies of identity problems.[15] And there are numerous studies, often utilizing government demographic data, which analyze such statistical effects of discrimination as income inequality or residential segregation. From his important demographic analysis, after assessing the impact on income of regional, educational, and occupational differences between blacks and whites, Farley concludes that the large dollar differential in black-white income levels left even after all these other variables are considered probably shows the cost of discrimination.[16] There are many research papers in the social science literature, legal briefs, court cases, and affirmative action plans which similarly examine differentials in income, occupation, education, and residence by race and sex. Most look at the effects of discrimination, with only brief attention to the concrete discriminatory mechanisms which may lie behind those effects.

Sharp statistical imbalances have often been considered to be *prima facie* evidence of discrimination. Statistical imbalances, such as one percent of a particular category of managers being composed of minorities and women in a community where blacks and women make up half of the white-collar employees, is usually considered a clear sign that discrimination is present. But critics of affirmative action have raised questions about the use of statistics to probe discrimination. They have argued, often vigorously, that sharp racial and sexual inequalities are due to other factors. This is one reason why the Civil Rights community could contribute very significantly to public policy by undertaking several in-depth studies of the actual mechanics of discrimination.

The Mechanisms of Race and Sex Discrimination. Discriminatory actions* take different forms in this society, both individual and institutional (organizational) forms. Considerable individual discrimination remains in this society, as can be seen in the violent acts directed at black Americans. My own observations in college settings, and a recent study of southwestern medical schools by one of my graduate students, suggests that "old-fashioned" prejudice-motivated discrimination, practiced by whites and males, is much more widespread than we usually admit.[17] Some of this discrimination is camouflaged by a thin veil of equal opportunity rhetoric. There is a great need for more research on barely disguised prejudice and individual and small-group discrimination.

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*Discrimination involves actions, as well as one or more discriminators and one or more victims on the receiving end. Discrimination has a negative and differential impact on the victims. Overt or hidden, discriminatory actions vary in the degree to which they are imbedded in large-scale organizations.

Institutional discrimination deserves intensive study as well. As one Civil Rights Commission report notes, "discrimination, though practiced by individuals, is often reinforced by the well-established rules, policies, and practices of organizations." There seem to be two broad types of institutionalized discrimination. Type I, direct institutionalized discrimination, refers to organizationally-prescribed or community-prescribed actions which by intention have a differential and negative impact on members of subordinate race and gender groups. Typically, these actions are not sporadic, but are routinely carried out by a large number of individuals guided by the norms of a large-scale organization or community. They can be institutionalized in the guise of segregation laws or informal discriminatory practices. Examples include the informal steering practices of realtors and the informal harassment of women at work, examples examined in detail below. Type II, indirect institutionalized discrimination, refers to practices having a negative and differential impact on members of subordinate race and gender groups even though the organizationally prescribed norms or regulations guiding those actions were established, and carried out, with no intent to harm the members of those groups. For example, intentional discrimination in the education and training of members of subordinate groups has had the important side effect of handicapping them later in their attempts to compete with dominant group members in the employment sphere, where hiring and promotion standards often incorporate educational credentials or requirements.[18]

Steering Practices in Housing. Intentional institutionalized discrimination is still a regular feature of American life. Nowhere is this more obvious than in the informal discriminatory practices in the real estate industry, an industry almost completely ignored in recent arguments about the decline in discrimination in this society. (See, for example, Gilder and Glazer) Equal opportunity and affirmative action plans in the area of housing seem to have had little effect in reducing segregation. Numerous statistical studies of housing segregation have demonstrated that segregation remains massive today and cannot be explained in terms of the preferences or incomes of minority Americans. A recent study by Diana Pearce in the Detroit metropolitan area demonstrates some of the actual discriminatory mechanisms which maintain racial segregation in housing.[19] This study also suggests that housing discrimination is both intentional and well-institutionalized in informal practices of many real estate organizations. And the study suggests a research methodology for further research on discrimination not only in housing but in employment and education as well.

Pearce found considerable persistence and increased subtlety in the character of housing discrimination directed against blacks. As part of a systematic field study, one black and one white couple, with similar economic (income, credit, etc.) backgrounds, were sent to the same 97 real estate brokers. Consistent differences along racial lines were found in financial advice, personal treatment, houses shown, and time devoted to the couples. Even though roughly the same as the whites, the economic resources of the black couples were evaluated as "lower" in terms of the house prices and financing white real estate agents suggested they could consider. Discrimination in personal treatment was also found, but the racial differences in such matters as courtesy were small. Nevertheless, black couples were much less likely to be shown houses than white couples on the first visit. And those black couples who were shown houses were more likely than whites to be shown (steered to) houses in or near already-black areas. Interestingly, brokers often suggested that black couples look in some other area than where the real estate firm was located. On the whole, brokers spent much more time with white couples than with blacks. Pearce illustrates the subtle nature of current discrimination with this example: Although treated courteously, one black homeseeker (with spouse) who went to a suburban real estate firm was told that his income and savings were insufficient to buy housing in that suburb. The man came back and asked if the researcher had made a mistake, not recognizing that a discriminatory act had occurred. "The white couple, however, was sent out with the same income and savings; in their interview, in contrast, no mention was made to them of inadequate resources for the community, and they were both urged to buy and were shown houses in the same community as the firm in question was located in."[20]

Pearce found a tendency for the more discriminatory real estate brokers to be in larger and more profitable firms. Once race-related discriminatory practices are built into regulations, routines of behavior, and training programs, they are not likely to be altered by weak outside pressures for change or even by a few court suits. Analysis of broker attitudes and prejudices led Pearce to the conclusion that "the organizational situation that salespersons find themselves in overwhelms whatever personal predilections they may have had to either discriminate or not."[21]*

Pearce's study shows that intentionally discriminatory actions are well-institutionalized in this society. Often subtle and sophisticated, steering practices help maintain mostly segregated housing. This "tester" type of methodology could be adapted for use in the study of discrimination in other areas such as employment hiring patterns.

Sex Discrimination at Work. Another major example of direct institutionalized discrimination can be seen in two major recent studies of sexual harassment on the job by Catherine MacKinnon and Lin Farley. These harassment practices are intentional, widespread, and informal. A key aspect of sexual harassment on the job is that it reinforces other types of employment discrimination directed at women. Work becomes a prize men give to women if women permit sexual harassment. Like wife battering and rape, sexual harassment and extortion at work are just now coming out of the closet. And like rape this harassment is pervaded with stereotypes of working women as sex objects, including the notion that most women intentionally invite the harassment. Sexual harassment has been portrayed by Farley as "unsolicited nonreciprocal male behavior that asserts a woman's sex role over her function as a worker."[23] The actual mechanisms and practices of harassment include "staring at, commenting upon, or touching a woman's body; requests for acquiescing in sexual behavior; repeated nonreciprocated propositions for dates; demands for sexual intercourse; and rape."[24] Verbal abuse is common. An 18 year old file clerk reported that her boss regularly asked her to come into his office "to tell me the intimate details of his marriage and to ask what I thought about different sexual positions." Physical contact ranges from repeated "accidental" contacts to actual rape. One woman worker noted that "My boss . . . runs his hand up my leg or blouse. He hugs me to him and then tells me that he is 'just naturally affectionate.'"[25]

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*Direct discrimination by real estate brokers against white women is probably less common than in the case of minority persons because women frequently seek for housing with their husbands. However, when it comes to the growing number of single women seeking to buy housing, discrimination again appears. A mythology exists in the real estate industry with regard to the effect of single female homeowners on property values. Only a limited number of single women progress far enough in the house-buying process to be "steered" away from a particular neighborhood. Single women are believed to be poor credit risks by many if not most males in the housing industry. Women are commonly stereotyped as having less business sense than men; their incomes are thought to be unstable, and there is a pervasive fear that they will become pregnant and lose their jobs.[22]

Sexual harassment is commonplace in the workplaces of America. A 1975 Cornell study of 155 women employees found that 92 percent of them felt sexual harassment was a serious problem for women. Half reported they themselves had been the victims of physical harassment, while 70 percent said they had been the victims of repeated and unwanted sexual comments, suggestions, or physical contact. And a 1976 *Redbook* survey of 9,000 women found that 90 percent had themselves encountered unwanted sexual harassment in their jobs. More than half the sample felt this sexual discrimination was a serious problem. In this survey a typical harassment pattern was that of an older man attacking a woman in her twenties or thirties. And a survey of women at the United Nations Secretariat found that half of the 600 women respondents reported sexual pressures on the job, particularly in promotions. Most said they had not reported the sexual harassment either because there were no channels to use or because it would have hurt their careers.[26]

MacKinnon suggests there are two types of sex discrimination. In some cases it is a question of *quid pro quo*, of sexual favors for an employment benefit: "If I wasn't going to sleep with him, I wasn't going to get my promotion."[27] Retaliation for rejecting male advances can take the form of demotions, salary cuts, unfavorable notes in one's personnel file, poor working conditions, ridicule, and pressure to resign. In addition to the *quid pro quo* mechanism of discrimination, there is the type of discrimination which is a routine feature of a job. As MacKinnon notes from her research: "She may be constantly felt or pinched, visually undressed and stared at, surreptitiously kissed, commented upon, manipulated into being found alone, and generally taken advantage of at work."[28] Many women workers have to tolerate some type of sexual harassment in order to work. This harassment is an integral part of the general subordination of women as workers and the exclusion of women from opportunities and job advancement.

In the Cornell survey 78 percent of the harassed women said they felt "angry," 48 percent "upset," and 23 percent "frightened." And the Cornell study found that among those who had experienced harassment a large proportion reported suffering on-the-job penalties for not responding and/or eventually quitting the job because of the discriminatory treatment. This "quit" reaction to harassment often results in hardships for women, since unemployment benefits are usually not available for this "cause," and women who protest by quitting may have difficulty in getting a comparable job in the future.[29] This quit rate also increases the turnover and unemployment rates for women, rates which male writers such as Gilder cite as evidence that women are not as serious about work as men.

This sexual harassment is part of a large structure of employment discrimination in this society. It does not exist in isolation as the peccadillos of scattered males. A recent study of secretaries and managers demonstrates that many secretarial situations in business are patrimonial, that is, the status and income of a female secretary is tied to that of her male boss. Kanter concludes from her study of a major industrial supply corporation that secretaries got many of their rewards not from skills they used but rather from the rank and promotions of their bosses. Promotions for secretaries were often tied to promotions of their male bosses. Secretaries may even move with their bosses from one geographical area to another. Sexuality was found to be important in the promotability of a secretary. Kanter notes that secretaries were sent to secretarial schools as much for posture, how to dress, and use of deodorants, as for typing and filing skills. Since secretaries are status symbols for their bosses, personal appearance and attractiveness are critical for secretarial success. Kanter quotes one corporate official: "We have two good secretaries with first-rate skills who can't move up because they dress like grandmothers or housewives." Another was frank about the "selling" of secretaries: "Even those executive secretaries who are hitting sixty don't look like mothers. Maybe one or two dowdy types slipped in at that level, but if the guy they work for moves, they couldn't be sold elsewhere at the same grade."[30]

Even women in nontraditional roles often find themselves to be sexually defined and manipulated. Kanter's study of the few women on the sales force of this industrial corporation found that these token women were frequently singled out as much for their physical charactetistics as for their skills. One male sales representative noted this: "Some of our competition, like ourselves, have women sales people in the field. It's interesting that when you go in to see a purchasing agent, what he has to say about the woman sales person. It is always what kind of body she had or how good-looking she is or 'Boy, are you in trouble on this account now.'"[31]

It seems clear from Kanter's analysis that sexual harassment is but one part of a larger-scale system of sex discrimination. The pieces fall into place as one digs deeper into this system. Male stereotypes translated into discriminatory actions plague women workers in many ways that male workers do not have to face.

AFFIRMATIVE ACTION AND DISCRIMINATION

I have chosen to go into detail on these two types of discriminatory mechanisms in order to demonstrate that race and sex discrimination are a long way from being abolished in the United States. The practices of steering and of sexual harassment are institutionalized in widespread informal practices in many organizations. Those whites and males who engage in the practices for the most part know what they are doing. These practices are intentional and seem motivated by a desire to protect privileges and by prejudices and stereotypes. Both types of practices have a serious impact on the lives of members of subordinate groups. And both illustrate that existing legal neutrality and affirmative action approaches in housing and employment have not eradicated major types of institutionalized discrimination.

Approaching affirmative action from the context of institutionalized discrimination is a key to understanding. The notion of Reagan administration officials that the majority of nonwhite and female Americans are non-victims of discrimination has just been shown to be false. Since discrimination is still very widespread, affirmative action programs are not only essential, they greatly need to be expanded. Every federal civil rights agency is severely understaffed. For example, OFCCP with its 1200-1300 employees must review 174,000 federal contractors per year. This is an impossible task. As a result, many companies can continue to discriminate with impunity. A critical point here is that institutionalized race and sex discrimination must be constantly kept in mind if affirmative action issues are to be satisfactorily dealt with. Let us now examine some of the misconceptions about affirmative action.

Misconception Number One: Affirmative Action is Reverse Discrimination.

In the 1970s the opponents of affirmative action scored a brilliant coup by getting the mass media to discuss affirmative action in terms of the simplistic galvanizing phrase "reverse discrimination." For example, in March 1976 U.S. News and World Report ran a feature story titled: "Growing Debate -- Reverse Discrimination -- Has It Gone Too Far?" and in September 1977 Newsweek ran a cover story under a front page headline of "reverse discrimination." The cover showed a white student and a black student in a tug-of-war over a college diploma. Many academic critics have also made use of this phrase.

Yet the term reverse discrimination is a grossly inaccurate label for the events and actions the critics deplore. This can be seen clearly if we follow the principle of keeping traditional patterns of institutionalized discrimination in mind in assessing arguments about affirmative action. Think for a moment about patterns of discrimination against black Americans in the United States. Traditional discrimination has meant, and still means, widespread blatant and subtle discrimination by whites against blacks in most organizations in all major institutional areas of this society -- in housing, employment, education, health services, the legal system, and so on. For three centuries now millions of whites have participated directly in discrimination against millions of blacks, including routinized discrimination in the large-scale bureaucracies which now dominate this society. Traditional discrimination has meant heavy economic and social losses for blacks in all institutional sectors for hundreds of years. One result is that most black Americans today have little in the way of banked resources (economic and educational) which have been handed down to them by their parents and grandparents.

What would the reverse of this traditional race discrimination look like? The reverse of the traditional discrimination by whites against blacks would mean the following: For several hundred years, massive institutionalized discrimination would be directed by dominant blacks against most whites. Most organizations in areas such as housing, education, and employment would be run at the top by a disproportionate number of blacks; and middle- and lower-level decision makers would be disproportionately black. These decision-making blacks would have aimed much discrimination at whites. As a result, millions of whites would have suffered trillions of dollars in economic losses, lower wages, unemployment, political weakness, widespread housing segregation, inferior school facilities, and lynchings. That societal condition would be something one could reasonably call a condition of "reverse discrimination." It does not exist, nor is it likely ever to exist.

Reverse discrimination is a mythological notion designed primarily to confuse and discredit,not to enlighten. Whatever cost affirmative action has meant for whites (or white males), those costs do not total to anything close to the total cost of true reverse discrimination. To my knowledge no affirmative action plan in industry, housing, higher education, or government has had the purpose or effect of establishing a system of black supremacy over whites or of female supremacy over men. Affirmative action plans as currently set up do not make concrete a widespread anti-white prejudice on the part of blacks, nor a widespread anti-male prejudice on the part of women.

For the most part affirmative action plans have not been established and have not been set into operation -- especially in terms of line decision-makers -- by minorities or by women. Major affirmative action plans in the areas of education, housing, and employment were originally set up and are still largely implemented by white males who dominate the line decision making positions in all major organizations in the society. Moreover, it is relatively rare in organizations for a white person to be discriminated against by a black person, or for a man to be discriminated against by a woman, simply because the members of subordinate groups have generally been relegated to relatively powerless positions. Certainly there are a few organizations, or departments in organizations, where minorities and women occupy decision-making positions and could thus discriminate against white males, but such situations are atypical. This can be seen in the fact that most of the evidence presented by critics to illustrate "reverse discrimination" does not involve black-against-white or women-against-men examples.[32] Perhaps most importantly, large-scale race and sex discrimination, in most organizations, in most institutional areas, directed against whites and males does not exist in this society.

If reverse discrimination in a widespread institutionalized form does not exist, and if reverse discrimination in individual forms is relatively rare, why is it such a widely accepted notion? The answer seems clear. "Reverse discrimination" is often used as part of a reactionary counterattack aimed at discrediting remedial programs with upward mobility benefits for minorities and women.

It is true that to this point in time a modest number of white males have paid a price for some affirmative action programs. If affirmative action is successful, particularly in a society with little economic growth, it will entail some cost. White male suffering does indeed exist. But to compare the scale of that suffering to the scale of the suffering of minorities and women seems rather absurd. A white male who suffers as an individual from remedial programs such as affirmative action in employment or education suffers because he is an exception to his privileged racial group. A black person who suffers from racial discrimination suffers because the whole group has been subordinated, not because he or she is an exception. MacKinnon suggests this contrast:

> When a white charges race discrimination (for example, due to preferential admissions for blacks) he is protesting the cost on one sphere of his life of a rectification process of an entire system that has tried to

> destroy all blacks in every sphere of their lives for generations, and could afford to ignore their protests.[33]

Misconception Number Two: *Affirmative action efforts have been so effective that white male resistance has been inconsequential*. Much opposition to affirmative action seems to suggest the misconception that there has been little effective resistance, that white males have watched helplessly as affirmative action has sharply eroded their control of organizations and institutions. Given the fact that white males have usually been in substantial control of those affirmative action plans which exist in areas such as business and higher education, this view would seem to be problematical on its face.

Containment seems to be one major strategy implemented by white males (or whites) in the face of equal opportunity and affirmative action pressures. *Containment* means *intentionally attempting to slow down or end the process of dismantling institutionalized race and sex discrimination*. Diana Kendall recently completed a study of a half dozen medical schools in the Southwest. She found a variety of discriminatory patterns harming minority and female students and concluded that when organizations such as medical schools are forced by law "to abandon categoric exclusion of subordinate group members as a first line of defense in preserving dominant group status and privileges, dominant group members may move to second and third lines of defense."[34] The second and third lines of defense can include more informal or subtle forms of discrimination to insure continuing domination and slow down the progress of women and minorities. From her recent study of sexual harassment on the job, Farley has come to a similar conclusion: the "naive belief that male opposition will eventually disappear from a sexual intermingling of occupations, as is now required by law, is best replaced by a more realistic assessment of the ways men, despite this forced entry, will attempt to insure their domination and the continuation of job segregation."[35] Public policy toward discrimination has yet to come to terms with this second line of defense.

Containment strategies can be seen in higher education employment, where a variety of "dodges" have developed aimed at reducing the effectiveness of equal opportunity and affirmative action programs. There are reports of college and university officials telling white male candidates for employment that they were rejected because the positions had to be offered to minorities and women, when they were really turned down because of their credentials or their personalities. And the rejected white males often become aggressive opponents of affirmative action. Goodwin lists a number of ways in which administrators and faculty "play games" to avoid affirmative action prescriptions in higher education.[36] For example, some departmental chairmen knowingly offer positions to women and minorities at salaries the candidates have previously indicated are unacceptable. When the position is turned down, a chairman then hires a white male candidate at a higher salary. The chairman can then claim he did offer a position to a woman or minority person. Or well-qualified minorities and women can be discouraged from accepting an offer because the chairman (or other male faculty member) emphasizes in an insulting fashion that the offer is not "a real one based on merit but only an offer to meet statistical requirements." Even after a female or minority candidate is offered a position, some department chairmen have intentionally procrastinated in signing a contract until the candidate accepts an offer from another college. Goodwin points out that in all of these cases affirmative action is effectively sabotaged by the white males in control, while the colleges and universities maintain an image of "good-faith" recruitment efforts for the benefit of the relevant government officials.

Winning the statistical battle is a major focus in many organizations. In such organizations workers have been reclassified in order to make it look like the employer has a good affirmative action record in reports filed with the government. For example, senior clerical workers have been reclassified to "managers," although the job remains the same, and suddenly there are many more women in "management." Two management experts have noted these effective resistance activities by corporations:

> Instead of improving organizational climate and revamping human resource planning, legal staffs have been beefed up to fight discrimination cases. Instead of validating selection processes, more emphasis is placed on winning the statistical battle.[37]

Tokenism has been one of the most successful devices in slowing down the process of dismantling institutionalized discrimination. Reluctantly tearing down the traditional exclusion barriers over the last two decades, many organizations have retreated to a second line of defense called tokenism. Part of the tokenism strategy is to hire minorities and women for nontraditional jobs and put them in conspicuous and/or powerless positions. Following this strategy, officials must be careful not to place too many minorities and women in one particular unit of their organization.

Drawing on his work as a management consultant, Kenneth Clark has noted that blacks moving into nontraditional jobs in corporate America have frequently found themselves tracked into ghettos within the organization, such as a department of "community affairs" or of "special markets." Many professional and managerial blacks (and women) end up in selected staff jobs such as equal opportunity officer rather than in line managerial jobs. Clark notes that "they are rarely found in line positions concerned with developing or controlling production, supervising the work of large numbers of whites or competing with their white 'peers' for significant positions."[38] Minority and female "tokens" in managerial and professional jobs are frequently put into staff jobs with little power. They must rely on line managers (usually white males) to implement their suggestions. Moreover, decisions by those in staff positions dealing with affirmative action and equal opportunity may be seen as an irritant to line managers, who ignore such decisions because they see the programs as interfering with their more important production goals. Kanter found that staff people who tried to implement more equitable systems for job placement in an industrial supply corporation had difficulty in selling these programs to line managers.[39]

A common problem for minority and women tokens in nontraditional jobs is isolation from important organizational networks. They are more often than others without sponsors and peer connections and excluded from those informal gatherings which provide important information for performing a given job. In her study Kanter found that the professional and managerial categories in a large industrial corporation were virtually all single-sex, with very few women in them. Important training programs, task forces, lunches with colleagues, review meetings -- these were composed of males, with at most one token female per gathering. Women at these levels found themselves alone most of the time. She notes that the 20 token women in a sales force of 300 employees were scattered over 14 offices. These women were "symbols of how-women-can-do, stand-ins for all women," and they consequently "faced the loneliness of the outsider." Statistical rarity of women in a particular organizational unit can be an alienating force for such women employees. Their numbers are so small that they have difficulty creating "survival" alliances or coalitions which might support them as they face new problems and conflict in the organization.[40]

Tokenism can become a self-perpetuating cycle. Isolated and alone, unable to draw on old-boy networks for routine assistance, many minority or female employees have difficulty in coping with the tensions of these higher-level jobs. As a result, turnover may increase. White male managers, then, may cite the difficulties of these tokens in arguing against affirmative action and equal opportunity programs. Kanter makes the key point that in the long run increasing the proportion of minorities and women in an organizational unit beyond token numbers is critical for equal opportunity to work. Going beyond tokenism is necessary from the point of view of social justice for minorities and women. But going beyond tokenism is also critical from a practical point of view, as perhaps the only way of actually dismantling the age-old structure of institutionalized discrimination. "A mere shift in absolute numbers, then, as from one to two tokens, could potentially reduce stresses in a token's situation even while relative numbers of women reamined low."[41] Supportive coalitions can then form. Much opposition to significant increases in the numbers of qualified minorities and women in the name of "benign neglect" and "letting the market provide its own answers" ignores the social system aspects of desegregating this society. Kanter concludes that there is an important case to be made for increasing numbers beyond tokenism "as a worthwhile goal in itself, because, inside the organization, relative numbers can play a large part in further outcomes -- from work effectiveness and promotion prospects to psychic distress."[42]

Misconception Number Three: Affirmative action efforts are destroying the normally meritocratic procedures in organizations. The issue of merit is often a focus of critics of affirmative action. Maintaining that "there is no principle of selection other than merit which does not perpetuate an injustice," a publication of the Anti-Defamation League argues that affirmative action violates fairness by pushing nonmerit characteristics.[43] The merit idea is linked to the idea of "qualified" persons, whether the persons concerned are students applying for college or job applicants. One argument is that affirmative action programs setting goals and timetables for the employment of minorities and women usually lead to the hiring of "unqualified" persons.

The issue of merit is a complex one not easily discussed in the space available here. But I do think it is important to keep a number of points in mind when this issue is raised. The first is that in many complex bureaucratic organizations there has long been -- and prior to affirmative action programs -- a meritocratic system on paper and a nonmeritocratic system in practice. There are routine particularistic features in the operation of bureaucracies, including those in industry and higher education. One expert, William Chambliss, has aptly characterized real life organizations: "Contrary to the prevailing myth that universal rules govern bureaucracies, the fact is that in day-to-day operations rules can and must be selectively applied."[44] One reason for this is that the rules are stated in the abstract and daily reality is concrete and specific. And the reality is that virtually all large bureaucracies are controlled, particularly at top and middle-level decision-making levels, by white males. White males apply the general rules using their own discretion and often can use the vagueness of the rules to justify hiring or promoting whomever they wish among possible candidates. "And if ambiguity and vagueness are not sufficient to justify particularistic criteria being applied, contradictory rules or implications of rules can be readily located which have the same effect of justifying the decisions, which, for whatever reason the officeholder wishes, can be used to enforce his position."[45] As most of us situated in bureaucracies know, they are not in actual practice the merit-oriented, universalistic organizations that critics of affirmative action seem to suggest. Internal politics, family ties, and personalities routinely affect decisionmaking in organizations. Until relatively recently, many such organizations had intentional exclusion barriers directed against women and minorities. Making all such organizations into the meritocratic ideal-type suggested in much criticism of affirmative action will be very difficult and will require far more adjustments and internal democracy than the critics of affirmative action have yet considered.

Higher education is often cited as a major example of a meritocratic system of faculty hiring and promotion. However, what is merit in practice is always subject to interpretation by those with the greater power. According to the American Association of University Professors, what is merit for college professors still rests on intuition, custom, and presupposition. Thus, "it's not surprising that the person chosen tends to look like the people who are doing the choosing."[46] Many analysts of higher education note that the present system, while described as a meritocracy, is frequently in reality a non-rational, subjective, and elitist system controlled by white males, which still allocates rewards heavily to persons considered acceptable to those in power.[47]

Given the weakness in many areas of governmental compliance efforts and the declining civil rights pressures over the last decade, it is unlikely that the majority of corporations, agencies, and colleges have gone any farther than tokenism as a strategy for coping with affirmative action pressures. In such a situation most organizations should be able, with modest effort, to find well-qualified minorities and women for the small number of nontraditional positions they intend to fill. According to one survey 70 percent of corporate executives report they cannot find qualified women and minorities. Yet a top executive at Sears, Roebuck, and Co. has suggested that these executives are not being candid:

> We don't believe the 70 percent response to the Yankelovich survey that said that the biggest problem with affirmative action is the availability of qualified minorities and women. That's not the biggest problem. The biggest problem is in acceptance -- in getting management, which still happens to be white males, to accept the fact that if we start with the concept of individual differences and individual worth,[48] there are a lot of minorities and women out there who can do anything.

The suggestion that there are a lot of qualified minorities and women who are not being tapped is here corroborated by an unlikely source, a top executive who himself is a white male. He further implies that for every corporation under close government scrutiny there are two hundred employers who are ignoring affirmative action and "are laughing at the whole process." While corporations such as Sears and AT&T get a lot of scrutiny from the government and the media, a majority of corporations move along, at best, at a snail's pace of tokenism. As the Sears executive put it, "Many companies -- they go and buy one black, one woman and say, 'Hey, we've got them.'"[49]

In considering what is or is not "merit," there is also the difficult question: are credentials and paper-and-pencil test scores good measures of actual ability to carry out jobs satisfactorily? In many cases, ever-rising educational credentials have been used to screen out minorities and women unnecessarily. Many jobs have an educational credential as a requirement. Yet one recent study has estimated that less than one third of the labor force really needs a high school diploma or college degree to perform satisfactorily on the job.[50] This is true for white-collar jobs such as most clerical and sales positions, as well as for most blue-collar jobs. The U.S. Employment Service's job analysis manual and the Bureau of Labor Statistics Occupational Outlook Handbook make it quite clear that most blue-collar and white-collar jobs in this society can be learned on the job, in a few weeks or less, and without a real need for a high school diploma. "Bookkeepers have been converted into machine operators. Bank tellers have become, in part, keypunch operators."[51] Yet this computerized automation of offices and factories has sometimes been used as a rationale for excluding minorities who are told they do not have the specialized skills necessary.

The inflation in credentials in the United States is suggested in statistical comparisons with other major industrialized nations. For example, the West European labor force -- rather productive in the last decade -- has much less schooling on the average than black Americans. One study by Newman and her associates has revealed that the following proportions of workers in key job categories had completed secondary school or above:[52]

	United States		France	Sweden	Britain
Job Categories	Whites	Blacks			
Professional	91%	89%	39%	35%	53%
Administrative	65%	43%	36%	35%	30%
Clerical	72%	69%	7%	8%	16%
Sales	56%	44%	5%	5%	9%
All blue-collar jobs	30%	20%	1%	0.5%	2%

Notice the much higher proportions of black Americans who have high school (or higher) degrees compared to French, Swedish, and British workers. As a group, black clerical workers have had much more schooling than European professional and administrative workers. Black manual workers, as a group, have had much more schooling than European clerical and sales workers. Even allowing for the different types of school systems involved, one can estimate that many U.S. jobs which now have screening requirements such as high school diplomas and college degrees do not in fact need to require such credentials for job performance. And if these higher-level credentials requirements themselves are used as the major determinants for who is "qualified" or "best qualified" for a job, they often screen out disproportionate numbers of otherwise qualified minority applicants in areas such as employment. "Qualified" or "best qualified" have come to be defined less in terms of a person's true abilities than in terms of the degrees and other credentials one possesses. Another problem here is that neither credentials nor standardized testing can reliably measure motivation and initiative, or for that matter, abilities such as artistic skill, mechanical dexterity, and reliability.

recent by the U.S. Civil Rights Commission
The/*Affirmative Action in the 1980s* report/emphasizes the important point that the "starting point for affirmative action plans with the problem-remedy approach is a detailed examination of the ways in which an organization presently operates to perpetuate the process of discrimination." This is an important

policy suggestion, since it underscores the need to examine the specific discriminatory mechanisms and barriers in a specific organization. It is probable that many organizations undertaking this self-analysis will find unnecessary barriers such as excessively high credentials requirements for many types of clerical, sales, technician, and skilled blue-collar jobs. Expanded affirmative action efforts might well be directed toward correcting the credentials inflation which limits the opportunities of otherwise qualified minorities.

In his book *Education and Jobs* Ivar Berg notes that most jobs in the society have a significant on-the-job training component.[53] Indeed, for many workers the on-the-job training is what teaches them most of what they need to do to carry out the job. Some of this on-the-job education is informal, learned from existing employees, while some takes the form of organized training. Even the occupants of high-level jobs routinely require on-the-job training of a rather basic sort. Thus a prominent management consultant recently commented:

> One very large company needed to give some basic financial training to some of their executives, but before they started the program, they had to figure out what they would call it without insulting these men who supposedly knew basic finance, because, after all they were running the company![54]

Given the crucial role of formal and informal on-the-job training for carrying out many levels of jobs, it would seem that the issue of "qualified" and "unqualified" minorities and women needs to be looked at in a new light. In addition to the large number of minorities and women who are well-qualified for nontraditional jobs, but are not now sought out, there are probably many others who could be trained in a reasonable length of time to carry out a given job. Developing training programs for these minorities and women would not be a radical departure for most organizations, since most are already engaged in on-the-job training. It might mean the expansion or reorganization of training programs to meet the societal goals of upgrading minorities and women. The president of AT&T recently noted that "extensive efforts" to train people were important in meeting most requirements under their consent decree. As a result, he noted, "the impact on the company [e.g., efficiency] was not significant."[55] Since most people hired for jobs require some on-the-job training, in a sense most are "unqualified" until they receive that training. Training programs aimed at including previously excluded groups are in this context an extension of what already is part of organizational life.

Misconception Number Four: Affirmative action plans for minorities are no longer necessary because the real problems facing minorities are problems of "class" not race. One commonly hears this argument today in regard to black Americans. Many critics suggest that affirmative action and equal opportunity programs have primarily benefitted middle-class black Americans. They argue that as a result there is a growing polarization in the black community between a growing, affluent middle class and a poverty underclass. Since in their view racial discrimination is rapidly being eradicated for middle-class blacks, and since the problems of the underclass have to do with "class" not racial discrimination, then there is less need for affirmative action. Indeed, middle-class blacks are sometimes seen as contributing to the persisting problem for underclass blacks.[56]

One problem with this polarization argument is that the statistical evidence on family income does not lend it much support. The Bureau of Labor Statistics publishes data on three family budget levels, low, intermediate, and high. The level of income for an intermediate level family in 1979 was $20,500. This level has frequently been used as the minimum income required to be a modestly affluent "middle-class American family." The proportion of white families with incomes at or above the intermediate budget level increase a little from 47 percent in 1970 to 50 percent in 1979. The proportion of bla families falling into this middle-income range or above increased slightly from 24 to 26 percent. As Robert B. Hill puts it: "In short, the proportion of economically 'middle-class' families is not significantly different among blacks (one-fourth) or whites (one-half) today than it was a decade ago -- due to the unrelenting effects of recession and inflation."[57] (The gap between blacks and whites is even greater than these statistics suggest because wealth, such as stocks, bonds, and real estate, is omitted and because there are more extremely high-income families in the white group.) By this measure there has been little growth in the black middle class over the last decade. Looking at the very poor, we find that between 1969 and 1979 the proportion of black families below the poverty line stayed near 28 percent. Using these two proportions, we see no widening economic cleavage in black communities. The proportion middle-class hovered around one quarter in the 1970s, while the proportion poor remained close to 28 percent for the same period.

Both this paper and recent testimony by civil rights leaders have spelled out many types of organizational and interlocking discrimination which face all black Americans, including the neo-racism of containment strategies. There is still much intentional race discrimination, however sophisticated and subtle, which sets barriers in the way of upward mobility for nonwhite minorities. Frequently the plight of the black underclass is discussed as though their high unemployment, underemployment, low incomes, and poor housing conditions had little to do with racial discrimination. Indeed, in a recent New York Times Magazine article Carl Gershman argues that it is the worsening condition of the black underclass, not racial discrimination, which requires the greatest policy attention today. Critical to his argument is the idea that the conditions of poorer black Americans are somehow due to the "tangle of pathology" in which they find themselves.[38] The suggestion is that poor black Americans have gotten locked into a lower-class subculture, a culture of poverty, with its deviant value system of immorality, broken families, juvenile delinquency, and lack of emphasis on achievement and the work ethic. These arguments are not new, but are a resurrection of culture-of-poverty arguments made in the 1960s (for example, in Daniel Patrick Moynihan's The Negro Family). Now as then the victims are blamed for their own problems. It is admitted that this "tangle of pathology" ultimately stems in part from slavery and legalized discrimination in the "ancient past," but in the present the "tangle" has taken on a life of its own, a life which is not affected much by racial discrimination. If this misconception were true, poor blacks should face the same conditions as poor whites. But this is not the case. Poor blacks do not live in integrated "slums" with poor whites. Poor and near-poor blacks are less likely than comparable whites to get unemployment compensation when they are unemployed. They tend to hold even lower-paying and less secure jobs than poor whites. To the extent that the working poor are unionized, whites benefit from informal discrimination in unions.

In addition, the role of past discrimination in current "tangles of poverty" needs to be reassessed. Much "past" discrimination is not something in the distant past, but rather is recent. Blatant discrimination against blacks occurred in massive doses until a decade or so ago, particularly in the South. Most blacks (and whites) over the age of [illegible]6 years (more than half the population) were born when the nation still had massive color bars North and South. Most blacks over thirty years of age were educated in segregated schools of lower quality than those of whites, and many have felt the weight of blatant racial discrimination in at least the early part of their employment careers. And the majority of those black Americans under the age of 20 have parents who have suffered from blatant racial discrimination. Moreover, most white Americans over the age of twenty have benefitted, if only indirectly, from blatant racial discrimination in several institutional areas. Put this recent past discrimination together with today's blatant and covert types of racial discrimination and you have a better conception of the causes of much black poverty, unemployment, and underemployment than resurrected poverty-subculture theories provide. The real dilemma is the persisting tangle of interlocking and institutionalized discrimination in this society.

I noted in the first section of this paper that a substantial majority of black Americans surveyed in a 1979 Mathematica survey feel that there is a great deal of racial discrimination in this country. And the supposed beneficiaries of affirmative action (those with incomes over $20,000) were somewhat more likely than the poor to report a great deal of discrimination. There is a consensus among large majorities of the poor and of the middle class that racial discrimination remains a serious problem. In the same 1979 survey a majority of the black respondents saw a declining national commitment to equal rights. The survey asked: "Is the push for equal rights for black people in this country moving too fast, at about the right pace, or too slow?" Fully three quarters said "too slow."[59] This compares dramatically with the results of a similar question asked in a Harris survey in 1970; in that survey only 47 percent said "too slow," with 41 percent saying "about right."[60] The overwhelming majority of black Americans believe that the U.S. commitment to racial equality is eroding. Moreover, middle-class blacks are somewhat more likely than poorer whites to feel that the movement to racial equality is going too slowly. While 72 percent of those with incomes under $6,000 said the push for equal rights was "too slow," 83 percent of those with incomes over $20,000 said "too slow." Those who are supposed to have made the greatest progress in the last decade, middle-income blacks, are a bit more likely than the rest to see equal rights as moving too slowly, as well as to report a great deal of discrimination in the country.

How do black Americans see affirmative action? According to a 1980 *Black Enterprise* survey of its middle-income and upper-income black readers, 78 percent saw affirmative action as "somewhat effective." Virtually all (94 percent) thought affirmative action would still be needed in the 1990s.[61]

CONCLUSION: PUBLIC POLICY IN RETROGRESSION

The momentum toward expanding employment, educational, and housing opportunity for minorities and women has slowed significantly over the last few years. Governmental policymakers and private sector officials are now preoccupied with matters other than race and sex discrimination, as the fall 1980 congressional rejection of a much-needed fair housing bill and recent developments in the Reagan administration clearly indicate. Books by men such as Glazer and Gilder are widely heralded as demonstrating the need for government to pull back further from its already weakening commitment to equal rights. It was only a century ago that a decade or two of great progress in expanding opportunities for black Americans (1865-1885), called the Reconstruction period, was followed all too soon by a dramatic resurgence of conservatism and reaction called the Redemption period. While there are certainly major differences between then and now, today, only 16 years after public policy shifted significantly in favor of expanded opportunities for minorities and women, we again seem to be moving in a conservative and reactionary direction. Many powerful leaders are now calling for the ending or reduction of affirmative action and equal opportunity programs. The bottom line on evaluating affirmative action is that more than a decade into affirmative action no systematic or fundamental changes can be seen in any major institutional sector in the United States. White males overwhelmingly dominate, often alone, upper-level and middle-level positions in virtually every major bureaucratic organization in the U.S., from the Department of Defense, to General Motors, to state legislatures, local banks, and supermarkets. The dominant concern has shifted away from patterns of institutionalized race and sex discrimination. Sadly, those hurt most by the shift have been those people who have long suffered from traditional institutionalized discrimination -- minorities and women.

Much debate and action on affirmative action seems misplaced. An organization's lawyers and accountants may negotiate with the government's lawyers over a long period. And the result may be an affirmative action plan which is not grounded in a careful study of discrimination within the organization -- particularly of the covert, subtle, and sophisticated forms of discrimination. This in turn may lead to a poorly constructed affirmative action plan issued with fanfare, but one which is to be weakly enforced and token. A top Sears executive recently complained about negotiations with the government: "We are forced to create mounds of paper to prove that people aren't available instead of creatively and innovatively developing techniques to make sure people are available."[62] Whether he would aggressively pursue the development of new techniques to find qualified women and minorities if he did not face the paperwork is open to question. But a number of observers of organizations assessing organizational reactions to affirmative action have noted that too much of the effort often goes into paperwork, both statistical and legal, and too little into aggressively finding minorities and women for nontraditional positions. In a recent article two veteran management consultants have concluded from their experience not only that too much corporate effort is aimed at winning the statistical battle but also that hostile overreactions, little budget money, and poor management have created "mongrel" affirmative action plans which are weak. The weak efforts may bring in or upgrade a few minorities and women but alienate many white males, who can now blame their own problems on affirmative action.[63]

FOOTNOTES

1. Final Report on EEOC Prepared by Transition Team of Reagan Administration, excerpted in Bureau of Natonal Affairs, Daily Labor Report, January 23, 1981, pp. E1-E5; George Gilder, "The Myths of Racial and Sexual Discriminaton," National Review, 3, November 14, 1980, pp. 1381-1390; George Gilder, Wealth and Poverty (New York: Basic Books, 1981).

2. Charles L. Heatherly (ed.), Mandate for Leadership: Policy Management in a Conservative Administration (Washington, D.C.: Heritage Foundation, 1980), p. 205.

3. James D. Williams (ed.), The State of Black America, 1981 (New York: National Urban League, Inc., 1981), pp. 6-7, 307-321.

4. Nathan Glazer, Affirmative Discrimination (New York: Basic Books, 1975); Gilder, "The Myths of Racial and Sexual Discrimination"; for the views of a black conservative, see Thomas Sowell, Affirmative Action Reconsidered (Washington, D.C.: American Enterprise Institute, 1975).

5. See Glazer, Affirmative Discrimination, Gilder, "The Myths of Racial and Sexual Discrimination."

6. "Initial Black Pulse Findings," Bulletin No. 1, Research Department, National Urban League, August, 1980.

7. "Economics," Black Enterprise, August, 1980, p. 70.

8. "Whites, Blacks Hold Different Views on Status of Blacks in U.S.," The Gallup Opinion Index, Report No. 178, June, 1980, p. 10.

9. Cited in John C. Livingston, Fair Game? (San Francisco: W. H. Freeman, 1979), p. 78.

10. Nineteen percent replied "likely." "Whites Blacks Hold Different Views on the Status of Blacks in U.S.," The Gallup Opinion Index, p. 12.

11. 1980 Virginia Slim's American Women's Opinion Poll, The Roper Center, Storrs, Connecticut.

12. The next few paragraphs draw on Joe R. Feagin and Clairece Booher Feagin, Discrimination American Style (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1978), pp. 20-35; and Joe R. Feagin and Douglas Lee Eckberg, "Discrimination: Motivation, Action, Effects, and Context," Annual Review of Sociology, edited by Alex Inkeles (Palo Alto: Annual Reviews Incorporated, 1980), pp. 2-3.

13. Gunnar Myrdal, An American Dilemma (New York: McGraw-Hill, 1964), Vol. 1. p. 52n.

14. Cf. David M. Wellman, Portraits of White Racism (Cambridge: Cambridge University Press, 1977).

15. Kenneth B. Clark, *Prejudice and Your Child* (Boston: Beacon Press, 1955).

16. Reynolds Farley, "Trends in Racial Inequalities," *American Sociological Review*, *42* (April, 1977), pp. 189-207.

17. Diana E. Kendall, "Square Pegs in Round Holes: Nontraditional Students in Medical Schools," Ph.D. Dissertation, University of Texas (Austin), December, 1980.

18. For a thorough discussion of indirect discrimination, see Feagin and Feagin, *Discrimination American Style*.

19. Diana May Pearce, "Black, White, and Many Shades of Gray: Real Estate Brokers and their Racial Practices," Ph.D. Dissertation, University of Michigan, 1976; see also Ronald E. Wienk, *et alia*, *Measuring Racial Discrimination in American Housing Markets* (Washington, D.C.: U.S. Department of Housing and Urban Development, 1979); and Feagin and Feagin, *Discrimination American Style*, pp. 92-94.

20. Pearce,"Black, White, and Many Shades of Gray," pp. 271-272.

21. Ibid., p. 201.

22. Feagin and Feagin, *Discrimination American Style*, pp. 94-95.

23. Lin Farley, *Sexual Shakedown* (New York: McGraw-Hill, 1978), p. 14.

24. *Ibid.*, p. 15.

25. Catharine A. MacKinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979), p. 29.

26. Farley, *Sexual Shakedown*, pp. 20-21; MacKinnon, *Sexual Harassment of Working Women*, pp. 26-27; Claire Safran, *Redbook Magazine*, November, 1976, pp. 149-219; United Nations Ad Hoc Group on Equal Rights for Women, Report on file at the New York University Law Library, cited in MacKinnon, *Sexual Harassment of Working Women*, p. 26.

27. MacKinnon, *Sexual Harassment of Working Women*, p. 32.

28. *Ibid.*, p. 40.

29. Ibid., p. 47; Farley, *Sexual Shakedown*, pp. 21-22.

30. Rosabeth Moss Kanter, *Men and Women of the Corporation* (New York: Basic Books, 1977), pp. 74-76.

31. *Ibid.*, p. 217.

32. Cf. Glazer, *Affirmative Discrimination*.

33. MacKinnon, *Sexual Harassment of Working Women*, p. 132.

34. Kendall, "Square Pegs in Round Holes: Nontraditional Students in Medical Schools," p. 194.

35. Farley, *Sexual Shakedown*, p. 53.

36. James C. Goodwin, "Playing Games with Affirmative Action," *Chronicle of Higher Education* (April 28, 1975), p. 24, discussed in Nijole V. Benokraitis and Joe R. Feagin, *Affirmative Action and Equal Opportunity: Action, Inaction, Reaction* (Boulder, Colorado: Western Press, 1978). I am indebted to Nijole Benokraitis for helpful comments on an earlier draft of this paper.

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38. Kenneth B. Clark, "The Role of Race," *New York Times Magazine*, October 5, 1980, p. 30.

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41. *Ibid.*, p. 238.

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46. M. W. Wartofsky *et alia*, 'Affirmative Action in Higher Education," *AAUP Bulletin*, *59* (Summer, 1973), p. 178.

47. Feagin and Benokraitis, *Affirmative Action*, p. 181; cf. Herbert Hill, "Preferential Hiring: Correcting the Demerit System," *Social Policy*, *4* (July-August, 1973), pp. 96-102; and Troy Duster, "The Structure of Privilege and Its Universe of Discourse," *American Sociologist*, (May, 1976), pp. 73-78.

48. Max Benavidez, "The Sears Interview: Ray Graham," *Forum*, October, 1980, p. 16.

49. *Ibid.*, p. 17.

50. Dorothy K. Newman *et alia*, *Protest, Politics, and Prosperity* (New York: Pantheon Books, 1978), pp. 74-75.

51. *Ibid.*, p. 75.

52. These are 1960s data. *Ibid.*, p. 95.

53. Ivar Berg, *Education and Jobs* (Boston: Beacon Press, 1971).

54. "A Conversation with Rosabeth Moss Kanter," MS., October, 1979, p. 64.

55. Carol J. Loomis, "AT&T in the Throes of 'Equal Employment,'" Fortune, January 15, 1979, p. 57.

56. See Carl Gershman, "A Matter of Class," New York Times Magazine, October 5, 1980, p. 24ff.

57. Robert B. Hill, "The Economic Status of Black America," in The State of Black America, p. 34. The BLS data are also cited on p. 34.

58. Gershman, "A Matter of Class," pp. 92-95.

59. "Initial Black Pulse Findings," Bulletin No. 1.

60. Cited in ibid.

61. "Economics," Black Enterprise, p. 64.

62. Benavidez, "The Sears Interview," p. 16.

63. Pati and Reilly, "Reversing Discrimination," pp. 9-10.

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*Note: Portions of this testimony have been drawn from a paper given at the U.S. Commission on Civil Rights hearing on Affirmative Action, March, 1981.

UNIVERSITY of PENNSYLVANIA
PHILADELPHIA 19104

The Law School
3400 Chestnut Street

July 21, 1981

RECEIVED
JUL 27 '81
AUGUSTUS F. HAWKINS, M.C.

The Honorable Augustus F. Hawkins
Congressional Black Caucus
H2-344 House Annex #2
Washington, D.C. 20515

Dear Congressman Hawkins:

Barbara Williams suggested that I send the enclosed to you. Your thoughts and comments would be greatly appreciated.

Sincerely,

Ralph R. Smith

RRS:eb

Enclosure

STATEMENT

Of

Ralph R. Smith
Assistant Professor of Law
University of Pennsylvania
Affirmative Action to Dismantle the
Process of Discrimination, End Political
Isolation and Economic Exclusion

Before

The Subcommittee on Constitutional
Rights of the Senate Judiciary
Committee, Washington, D.C.,
June 18, 1981

INTRODUCTORY REMARKS

Mr. Chairman and Members of the Subcommittee:

Thank you for affording me the opportunity to share my thoughts on the status and future of affirmative action. The affirmative action issue remains one of the most important and one of the most misunderstood issues on the nation's current agenda. It is my fervent hope that these remarks will help to alleviate and not to compound some of that confusion. My name is Ralph R. Smith.* I am currently an Assistant Professor on the faculty of law at the University of Pennsylvania.

I am honored to have the opportunity to join the likes of William T. Coleman, Martin Kilson, Vilma Martinez and Robert Sedler in urging this Subcommittee to lend its weight and raise its voice to support a worthy cause -- that cause being the strengthening of affirmative action. Moreover, I feel particularly privileged to add to the record of these proceedings not only my own prepared statement but a statement from Working Women, a national membership organization with local affiliates in thirteen cities throughout the United States. That statement, entitled "In Defense of Affirmative Action: Taking the Profit Out of Discrimination", provides an insightful perspective on many aspects of affirmative action. I would also add to the record the excellent history and analysis of the federal contract compliance effort which was prepared by Barry L. Goldstein, Assistant Counsel of the NAACP Legal Defense and Educational Fund, Inc. This document, entitled "The Importance of the Contract Compliance Program: Historical Perspective", should be required reading for anyone seeking to understand this area.

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* Professor Ralph R. Smith, a member of the National Conference of Black Lawyers, the National Bar Association and a Founding Board member of the Affirmative Action Coordinating Center, is recent Past Chair of the Section on Minority Groups of the Association of American Law Schools. He teaches in the corporate area (Corporations and Securities Regulations) and has written and lectured extensively on affirmative action and civil rights. He appeared as counsel for amici in Bakke and Fullilove in the United States Supreme Court, in DPOA v. Young in the U.S. Court of Appeals for the Sixth Circuit and in Scarpelli v. Rempson in the Supreme Court of the State of Kansas.

While I appear today in defense of affirmative action, mine is not the role of dispassionate counsel. I am a supporter of affirmative action and I believe strongly that affirmative action is an appropriate and indeed a necessary response to the prevailing realities of contemporary America. This position is one that is reinforced by my own active involvement as lawyer, teacher and scholar during much of the decade-long debate on affirmative action.

My formal statement is built upon four assertions. One. The issue now at hand is the political viability of affirmative action, not its legality, nor its constitutionality, nor its morality. Two. Affirmative action is politically viable since it is not only responsive to the legitimate concerns of a broad-based constituency, but also because it seeks responsibly to balance competing legitimate interests, needs and aspirations. Three. None of the arguments against affirmative action can withstand serious scrutiny. Four. The arguments for affirmative action are compelling in light of the urgency of addressing now the problems of institutional discrimination, political isolation and economic exclusion.

After it was announced that I was invited to appear here today, several of my friends, acquaintances and colleagues called to express their concern and to offer their advice. They were concerned that these hearings came at a time when there appeared to be a wholesale retreat from so many of the programs and the policies that addressed the needs and concerned themselves with the plight of those who are poor and powerless in this powerful land of plenty. They were concerned that these hearings held ominous implications that yet another retreat was in the offing -- that is, a retreat from a commitment to move affirmatively to dismantle the process of discrimination and to remove the barriers to full participation in the nation's political process and economy.

Being well aware of the position of the Chair of this Subcommittee -- a position taken publicly, repeated often and articulated well -- I was unable to do much in the way of allaying these concerns. I could only say to them that, notwithstanding his public position, the Chairman had given his assurance that he was sincerely interested in hearing all sides and had given every indication that he would approach the issue conscientiously and would decide fairly.

Since I could not say more, I listened to their advice. The message was unamious and it was clear: Tell the Subcommittee that affirmative action is working.

Since I had already said just that in the statement I had prepared for the Subcommittee, this did not seem a particularly valuable piece of advice. But then, after hearing the same refrain again and again, I developed a better understanding of what my friends and colleagues were saying. And it was as much a message to me as it was to this committee.

Those of us who support affirmative action have been on the defensive for so long that we respond reflexively to the arguments against affirmative action. And, as I reviewed my statement here, I found that I too am prone to that response. In my statement I confront and offer rebuttal to the most serious accusations leveled against affirmative action. What I did not do enough of was to share with you enough of the real operational side of affirmative action.

Affirmative action is more than policies and programs, inputs and outcomes, arguments and responses. Affirmative action is a real life, flesh and blood human and humane phenomenon. This is something those of us who are members of academia and members of Congress forget. That is why we do not remember to say often enough, clearly enough, and loud enough that affirmative action works.

Affirmative action worked for both white workers and black workers, for both women and men in a Kaiser Aluminum plant in Gramercy, Louisiana. Prior to 1974, when Kaiser wished to hire craftworkers, it would go outside the company and hire people with previous craft experience. As a consequence, Kaiser production workers, whether black or white, male or female, were effectively denied an opportunity to advance to the higher-paying craft positions.

In 1974 Kaiser and the United Steelworkers of America entered into a collective bargaining agreement that contained among other things an affirmative action plan designed to eliminate the conspicuous imbalance in Kaiser's then almost exclusively white craftwork forces. The linchpin of this plan was an on-the-job training program -- a job-training program which for the very first time would allow production workers, black and white, men and women, the opportunity to acquire the skills to become craftworkers.

It is well known that one white employee who was not accepted into the program in its very first year instituted litigation to challenge the fact that some places were set-aside for blacks.[1/] What is often ignored is that the rest of the white workers did not sue. To the contrary, their union defended the plan agressively straight up to the United States Supreme Court where they ultimately prevailed. The union and the workers realized that affirmative action considerations had served to encourage their employer to rethink its employment practices and to change them in such a manner as to increase the real opportunities for all workers.

If we move from Gramercy, Louisiana to Detroit, Michigan and from production and craft workers to police officers, we find that neither the change of locale nor of employment affects the assertion that affirmative action works. In Detroit we have a city that was torn by racial tension that twice erupted into major civil disturbances; a city in which much of the tension was attributed to the poor state of police-community relations; a half-black city in which a virtually all white police force was looked on as an army of occupation.

Realizing the dangers inherent in the situation, one of the first things Mayor Coleman Young and his Police Commissioners did was to institute a plan to increase minority presence at all levels of the police department. As could be expected, there was a lawsuit brought by some white officers who perceived their chances of promotion as being affected adversely by any plan that would take account of race.[2]

In finding for the City and reversing the trial court, the Court of Appeals for the Sixth Circuit conveyed its understanding of the real issue presented.

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police.[3]

There is ample evidence for optimism in the city of Detroit. Permit me to add on this point an excerpt from a brief submitted by a coalition of community organizations in support of the Detroit police department.[4]

> The availability of significant numbers of black police officers has demonstrably increased the flexibility of the Detroit department to respond to potential law enforcement crises. The tasks of preventing crime and apprehending criminals have also been made easier. As importantly, it appears that the community support so vital to the law enforcement function is more likely to be achieved. There are fewer confrontations between the citizens and police, fewer police are killed, fewer complaints are being filed with the Michigan Civil Rights Commission, attitudes toward police have improved. Both the police and the community feel that a larger proportion of the black community support police efforts.[5]

Perhaps in some other place and in another era, these may seem inconsequential. From the perspective of those who deal daily with the problems and tensions of urban America, what has happened in Detroit has been an accomplishment of great magnitude.

The proposition that affirmative action works does not change when we move from the police academy to the academic community. The minority presence that has come about because of the affirmative action era has enlivened the learning environment, enriched intellectual content, and enhanced the educational experience of students and faculty alike.

Affirmative action considerations in admissions and financial aid have served to sensitize faculty and administrators to the often artificial and arbitrary barriers erected by mandatory cut-offs and an exclusive reliance on numerical indicators. Thus there are now countless programs that carefully scrutinize applications of both whites and minorities in an effort to discern motivation and other not easily quantifiable qualities that might suggest the potential for success. One of the most highly touted of these programs is the Special Admissions Curriculum Experiment (Sp.A.C.E.) program at Temple University Law School. This program considers any number of qualities thus affording each applicant the opportunity to qualify for admission. No one at Temple will deny that the approach and the program was stimulated by affirmative action considerations.

The positive impact of affirmative action on higher education goes well beyond access. At most institutions the curriculum reflects the concerns and contributions of the new constituency. While many of the experimental courses may have been discontinued, many have flourished and have become integral components of the curriculum.

Affirmative action considerations have encouraged the strengthening (and in some instances the establishment) of grievance procedures for all employers. Moreover, as in other industries, higher education has had to rethink its excessive reliance on credentials for the non-academic side of its workforce.

The new constituency fostered by affirmative action has played a large role in helping educational institutions to realize that, although they may function as employers, landlords and investors, these activities must be conducted in so responsible and forthright a manner as to be consistent with their primary role as institutions of higher learning.

Whether we look at the production line in Gramercy, or into a patrol car in Detroit, or into a campus in Los Angeles, we find evidence that affirmative action is affecting our social, economic and political landscape and changing it for the better.

STATEMENT

Of

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June 18, 1981

PREPARED STATEMENT

I

These hearings underscore the fact that the debate about affirmative action has shifted focus as well as forum. The question at hand is not whether affirmative action is moral, legal or constitutional. The significant question now is whether affirmative action remains a politically viable policy option. Because the issue is one of political viability, it is appropriate that affirmative action be reviewed to see whether it is responsive and responsible, that is, responsive to the legitimate needs and aspirations of an identifiable constituency and responsible in the sense of being cognizant of competing legitimate interests, needs and aspirations and, where possible, forging an accommodation.

Measured by this test, the survival of affirmative action seems assured. Affirmative action responds to a broad constituency. This constituency is not limited to the beneficiaries of affirmative action. Despite all reports to the contrary, there exists still in this country a broad base of support for deliberate measures to end the racial domination that has characterized and crippled American society. A recent strongly-worded letter to David Stockman opposing proposed changes in the federal contract compliance program numbered among its signatories Lane Kirkland, President of the AFL-CIO, Patsy Mink of the Americans for Democratic Action, Douglas Fraser of the United Auto Workers, Dorothy Ridings of the League of Women Voters of the United States and some thirty others representing organizations and unions, public interest groups and community groups across the country. These diverse groups made clear that, whatever their differences on other matters, they were "united in opposition to changes which would sound the death knell for the federal contract compliance program, for forty years a vital element in the national effort to provide equal employment opportunity".[6]

The depth and breadth of support for affirmative action is due in large measure to the fact that affirmative action has been implemented in a reasonable and responsible manner serving those who have been historically deprived while remaining cognizant of those who might of necessity be temporarily denied. Those who pretend that affirmative action is an insensitive and perverted improvisation of a band of overzealous bureaucrats seem intent on conjuring up an image that bears little resemblance to reality.

Affirmative action programs and policies can be divided into three broad categories: court-ordered remedial measures; contractual conditions imposed on contractors and grantees; voluntary efforts undertaken by employers and institutions. None of these evince the overzealousness the critics assert.

Courts order race-conscious remedial measures only after protracted litigation resulting in specific findings of identified discrimination and even then only when lesser measures would not suffice.

Affirmative action requirements attached as conditions for receiving federal funds are focused primarily on the federal contract compliance program developed by way of Executive Order 11246.[7] From 1941 to 1980 eight Presidents of both parties have contributed to the development of the current program. This bipartisan support has been due to constant tailoring of this program to avoid imposing overly burdensome requirements on the private sector. Contrary to the popular caricature, employers do not have to meet any single numerical target. Nor are they required to pass over better qualified candidates for entry or promotion decisions.

And voluntary efforts are certainly not going to be any less sensitive to the interests of white males. Institutions which have had closed doors for centuries are not likely to open those same doors so wide as to affect significantly the opportunities available to whites. An oft-overlooked but important fact is that, with one exception, the cases which found their way to the Supreme Court involved modest voluntary efforts. In DeFunis v.

Odegaard[8], the controversy was over 18 places in a law school class of 150. In *Regents of the University of California v. Bakke*[9], it was over 16 seats in a medical school class of 100. In *Weber* v. *Kaiser*[10], it was over 7 places in a newly established training program. In none of these cases or the countless other challenges to voluntary efforts which have been filed in courts across the country can there be found an iota of evidence that unions, educational institutions, government agencies or private employers are so enchanted with affirmative action that they have forged ahead disregarding the rights of whites. And even were they inclined to do so, the Supreme Court has made it clear that a strong predicate must be established for each instance where affirmative action amounts to a racial preference. For public agencies, the Equal Protection Clause of the Fourteenth Amendment requires the program be substantially related to a compelling governmental interest. For the private sector, such voluntary efforts can be undertaken and only where there is an "arguable violation" of the civil rights laws.

Circumscribed on all fronts by this solicitude for the rights of white males, affirmative action is only a first and tentative step toward disestablishing the process of discrimination and ending political isolation and economic subordination. By any reasonable standard, it is a quite modest compromise.

But modesty offers no immunity from assault. Affirmative action has come under fire from those who challenge its legitimacy, contending that it is illegal and unconstitutional, that it is unfair and not moral, that it is violative of enduring values of the society, that it fosters racial antagonism; and that it is just unworkable. Notwithstanding the existence of a solid constituency for affirmative action and a proven ability to be cognizant of the need to balance the competing interests, proponents of affirmative action find themselves constantly forced to respond to the barrage.

II

The argument that affirmative action runs the risk of encouraging racial antagonism is an argument which should be dismissed summarily.

It would be relatively easy to argue that affirmative action does exactly the opposite, that affirmative action enhances communication across racial lines, and reduces the risk of a racial confrontation. These arguments are probably true and quite possibly could be proven. But that is not necessary. The racial antagonism argument is just a euphemistic way of saying that affirmative action upsets some white people. Thus the only appropriate response is to dismiss it.

White people got upset at proposals to abolish slavery and to repeal Jim Crow laws. White people got upset at the thought of desegregated lunch counters, bathrooms, hotels, water fountains and hospitals. White people got so upset about proposed anti-lynching laws that Congress repeatedly failed to pass legislation that would protect the lives of blacks from hostile mobs.

In the history of race relations the fact that white people get upset is nothing new. There are white people who get upset at any attempt to emancipate people of color from the bondage of racial domination. In this regard affirmative action is in excellent company.

The Colorblindness and Meritocracy Arguments

The argument that affirmative action contravenes some historic commitment to enduring values of colorblindness and merit should be accorded no greater significance. This argument brings to mind the storefronts that advertise ready-made antiques. No one even vaguely familiar with American history would dare argue that colorblindness and merit have played so large a role as opponents of affirmative action would have us believe. It was not that long ago that the best jobs in skilled trades and professions were handed down from one generation to the other, all within the family; that bright and talented students and scholars were excluded from the most prestigious institutions of higher learning simply because they were Jewish; that no matter how well-educated, women were denied careers outside of the home solely because they were women. Vestiges of nepotism, favoritism, and patronage abound to this day. Children of the influential and well-connected still enjoy preferential treatment as regards admission to the more selective educational institutions. Political affiliation may still be more important than proven competence in government employment. The old saw "it is who you know, not what you know" has withstood the test of time. Moreover, our present inheritance laws are structured in such a manner as to allow an often insurmountable advantage to be awarded even the mediocre if that mediocrity is coupled with the accident of being born into wealth.

In light of all this, it takes neither exaggeration nor cynicism to conclude that while merit may have had its moments, it most certainly has not been the rule.

As regards colorblindness, the "enduring value" argument fails even more miserably. There is absolutely no support for colorblindness in the nation's customs, traditions and institutions.

A century of race-based chattel slavery, recognized by the Constitution and supported by the Courts and Congress, negates any inference that this was a nation committed at the outset to colorblindness. The development of "Black Codes" and the imposition of Jim Crow laws forbid the conclusion that the abolition of slavery signalled the embracing of colorblindness even as an ideal. It should be remembered that the popular source of the colorblindness articulation was a dissenting opinion in Plessy v. Ferguson,[11/] the case that lent U.S. Supreme Court imprimatur to the race-based policy of legal apartheid known as "separate but equal".

It might be contended that the commitment to colorblindness was made on behalf of the nation by a unanimous Supreme Court in Brown v. Board of Education.[12/] But this was in 1954, hardly long enough for colorblindness to be deified as an enduring value. What's more even now, three decades later, the mandate of Brown has yet to be obeyed, the promise of Brown yet to be fulfilled.

George Bernard Shaw spoke of those who saw wrong and tried to right it. Devoid of either historical basis or precedent in experience, this newly discovered and hastily refurbished notion of colorblindness can be seen for what it really is. That is, neither more nor less than a contrivance of convenience having as its purpose and design to put out the eyes of those who would see injustice and try to remedy it.

The Legal and Constitutional Arguments

The arguments that affirmative action is illegal and unconstitutional have been given their day in court. In fact they have been given days, weeks, months, years and even a decade in court. In the final analysis, despite numerous opportunities, the opponents of affirmative action have failed to persuade the courts that affirmative action is either illegal or unconstitutional. Considering the magnitude of the effort, the array of legal talent and the enormity of the resources expended, the legal onslaught on affirmative action has been a gigantic failure. The affirmative action concept has survived the legal and constitutional challenge and must now be confronted on political terms.

The Moral Argument

It cannot be denied that whether any program or policy is accepted by the public at large may depend a great deal on whether that program or policy is perceived to be fair. However, the arguments about affirmative action have not focused on the practical consequences of any perceived unfairness. Instead these arguments have focused on the accusation that affirmative action is intrinsically unfair and immoral to the extent that it encourages and even requires that race be taken into account. These accusations, coming from some academics and carried on the pages of the nation's scholarly and popular publications, have helped to foster considerable suspicions of affirmative action programs and policies.

The problem is not that reasonable people disagree. The problem is that opponents of affirmative action act as though affirmative action must be placed in some sort of suspended animation until such time that consensus can be achieved on how to resolve the fairness dilemma.

That is a proposition supported by neither reason nor precedent. Ours is a political process that has never relied on policy by consensus. Despite sharply divergent views on the morality of capital punishment, abortion and nuclear power, we have managed to devise and implement policies even as debate continues on each. Despite the protests of those who find it unfair that this is a system of taxation that often takes from the poor and gives to the rich, the Internal Revenue Service manages to collect taxes every year so that the government can function. The presence in our society of those who object on moral grounds to war has not posed any insuperable obstacle to a national commitment to building a formidable war machine.

In all of these areas, there is an understanding that the political process in a democratic society is in fact a market-place where conflicting ideas, agendas, interests and concerns are traded and adjusted and from which workable compromises emerge. By their very nature, those compromises are bound to be something less than perfect and thus perfectly suited for this imperfect world.

The opponents of affirmative action would have us forget all this to embark on a quixotic quest for an ideologically pure, conceptually clean policy around which a consensus can be formed. They know well no such pristine principle exists, that this is a senseless quest, and that it serves only as distraction from the urgent task of fashioning real remedies for real injuries.

The "Failure to Work Argument"

The accusation that affirmative action has not and cannot work may be the unkindest cut of all. Economist Thomas Sowell says:

> Despite the shift in the meaning of affirmative action, from prospective opportunity to retrospective results, the affirmative action program itself has little in the way of results to show for its own wide-ranging, costly, activity.13/

To support his proposition, Professor Sowell often cites numerous studies on black-white income ratios and black-white occupational ratios. Moreover, as he has with his opposition to desegregation, Sowell enlivens the cold statistics with anecdotal examples, "worst cases" scenarios and, admittedly, "theoretical conclusions" based on his economic premises.

Even so, Professor Sowell's data provide only thin support for his sweeping condemnation. Affirmative action has not been without good results. While Sowell and other opponents of affirmative action may be able to point to a few of its failures, supporters can point to a far greater number of successes.

Consider the situation in legal education. In 1969 there were less than two dozen blacks on full-time faculties of the nation's predominantly white law schools. Ten years later there were 150. In 1969 there were 2,128 black law students enrolled in these schools. By 1978, black enrollment had more than doubled to 5,350. No one in legal education will deny that this turnabout in both faculty and student levels is due in large part to the pressures and consciousness brought on by the affirmative action era.

Law schools finally began to seek out blacks who had been qualified to teach all along. And, despite the fact that few law schools have advanced beyond a level of tokenism -- which Kellis Parker of Columbia refers to as the "none to one" strategy -- well over half of the ABA-approved law schools have at least one minority professor. Often with the assistance and upon the insistence of these new teachers law schools established the so-called "special admissions" programs which even today account for a large portion of black and minority enrollment.

This success is no isolated aberration. Similar results have occurred in medical schools and business schools.

Choosing professional school statistics might seem to underscore the claim that, to the extent it works at all, affirmative action benefits only the least disadvantaged of blacks. According to U.S. Senator Orrin Hatch, the beneficiaries of affirmative action are the "well educated, well-trained people who are capable of getting jobs anyway, and not the downtrodden". This bit of hyperbole uses as its frame of reference changes in the white collar occupations and the professions while ignoring completely the far more significant changes in other sections of the job market.

A review of the litigation docket of the NAACP Legal Defense Fund reveals that the cases resulting in court-ordered affirmative action involved entry-level and promotional opportunities in blue-collar jobs. The same can be said for the dockets of the Mexican American Legal Defense and Education Fund and Lawyers Committee for Civil Rights Under the Law and those of other civil rights organizations.

Even the bulk of so-called "reverse discrimination" litigation has been around employment opportunities not likely to attract this "well-educated" elite group the Senator and others castigate. Notwithstanding the enormous attention afforded the *DeFunis* and *Bakke* cases, it is the *Weber* and *Minnick* cases that are most representative of the hundreds of lawsuits still being tried or on appeal. What Brian Weber and Wayne Minnick objected to were not some fancy programs targeted to the middle class. Instead, *Weber* involved an on-the-job training program for unskilled production workers at the Gramercy, Louisiana plant of Kaiser Aluminum. *Minnick* involved prison guards. *DPOA* v. *Young*, recently denied certiori, involves uniformed police officers. Certainly neither Professor Sowell nor Senator Hatch would wish to contend that these are jobs for which either well-educated blacks or well-educated whites are lining up.

III

It is possible to make a case for affirmative action on the strongest ground of all: It works. Even so, it has not produced as good results as many had hoped. But how could it? Even in the best of times, affirmative action could not help but be affected by the sustained assault to which it has been subjected. And these were certainly not the best of times. The 1970's witnessed an economic malaise that made even more difficult the task of reallocating opportunities so as to end exclusion from the economic mainstream.

There is little doubt that affirmative action was compromised almost as much by the source of the opposition as it was by its stridency. Among the most vociferous opponents of affirmative action have been found many self-proclaimed former allies of the civil rights movement. As importantly, the opposition included a most formidable group -- academics furious that their private preserve was no longer exempted de facto from affirmative action requirements. Using their superior and almost exclusive access to scholarly journals and other respected publications, the normally placid inhabitants of the ivory tower launched an invective-laden assault on affirmative action. They seemed unconcerned about joining forces with anti-intellectuals in pandering to the latent racism and baser instincts of the population. It was they who lent legitimacy to the anti-affirmative action forces by creating a fiction of affirmative action as an odious policy designed to provide employment and educational opportunity to undeserving minorities and women by denying these same opportunities to deserving white men.

Since it did not suit their purposes, the academics did not bother to mention that, despite the sound and fury of the DeFunis case, of the 53,000 new seats in the nation's law schools, both ABA-approved and ABA non-approved, only 8% were filled by minorities; and of the total enrollment in these schools, only 4% of the seats were filled by black students. Nor did they bother to mention that, even if every minority hired as a result of an affirmative action program were fired today, there would be virtually no effect on the unemployment rate of whites. Nor did they bother to say that the government enforcement effort was in fact a paper tiger. During the 13 year period between September 1965 (when OFCCP was created) and October 1978 (the effective date of President Carter's reorganization of equal employment agencies) only 12 of the more than 30,000 prime governmental suppliers were debarred for discriminatory practices.

As could be expected, affirmative action programs adopted pursuant to court-order were least affected by political opposition and economic malaise. Even so, as the "reverse discrimination" genre of cases gained notoriety, there were more and more collateral attacks on the judgments and settlements that terminated earlier litigation.

The "reverse discrimination" cases proved a substantial deterrent to voluntary affirmative action efforts. Until the Weber case was decided, employers felt caught in a "damned if you do and damned if you don't" dilemma. While their present practices would eventually give way to a charge of discrimination, a preemptive remedy would expose them to the greater certainty of a suit charging "reverse discrimination". To prevail against the latter lawsuit the employer would have to adduce evidence of prior discrimination that would then, in turn, expose them to the lawsuit they sought to avoid in the first place. Confronted with this situation, most employers chose to do nothing, awaiting some definitive assurance of immunity from the double whammy.

Because of the limitations inherent in court-ordered affirmative action and the chilling effect that "reverse discrimination" suits have had on voluntary efforts, the federal contract compliance effort carried a disproportionate amount of the burden and was exposed to a disproportionate amount of the opposition heaped on affirmative action.

Since 1969 the federal compliance program has been challenged in practically every district court and in every judicial circuit in the nation. It has been attacked with every conceivable argument. To their credit, the courts consistently have upheld the Executive Order and refused to stymie the administrative agencies' enforcement efforts. So has the Congress. But again it was not for the lack of someone trying. The Congressional Research Service of the Library of Congress confirms that in every Congress from 1969 on, at least one attempt has been made to curtail or dismantle the federal contract compliance programs. As recently as two weeks ago, the "Walker Amendment" made it to the Senate

House Conference Committee before it was finally defeated. Had it not been defeated, this amendment could have sounded the proverbial death knell for what is now the most critical leg of the affirmative action triad.

It is against this background that the success or failure of affirmative action must be measured. Affirmative action survived despite being sandbagged, sabotaged, and suckerpunched. That the concept is facing here yet another assault is a tribute to its inherent strengths.

IV

Freed from the strictures of continual advocacy, none but the most ardent supporters of affirmative action will contend that it is a paragon of perfection. Affirmative action emerged from the 1970's with both scars and flaws. The strident rhetoric and dire predictions left more than a bit of conceptual untidiness. Despite the protracted debate, there is still the tendency to confuse the affirmative action concept with particular affirmative action measures, plans or programs and to ignore critical distinctions between the roles and limits of the judicial institution and the political process. Moreover, there is an excessive reliance on the notion of discrimination whether past or continuing.

The affirmative action concept simply recognizes that in some instances race-conscious measures may be appropriate and even necessary in order to dismantle a process of discrimination or to end isolation from the political process or to end exclusion from the economic mainstream. On this level affirmative action is not committed to any of the particular measures that may run the gamut from informal ad hoc decisions to established plans; from using race as one factor among many to distinguish among other qualified candidates, to using race as a dispositive basis for decision; from an unspecified "bust efforts" approach to the more easily measured goals, targets, timetables, and even quotas. This distinction between the affirmative action concept and specific affirmative action measures is crucial. It provides a framework within which one can support affirmative action in general and simultaneously disagree about the wisdom, priority and necessity of using a particular measure in a given instance. The absence of such a framework accounts in part for the polarization that has characterized much of the debate thus far.

Similarly, there has not been a clear articulation of the necessary distinction between what the courts can do and what the political process can accomplish. Courts are limited to cases and controversies involving identified parties and specific factual allegations. Judicial decrees must be tailored to the dispute before the court. If affirmative action is to be ordered it must be addressed to the specific injury. This is the compensatory approach. Only in particular disputes is the court permitted to offer limited prospective relief. Consequently, it would be difficult and highly inappropriate for a court to attempt to frame a decree sufficiently broad so as to dismantle a process of discrimination.

The political process is not so bound. Its protection can be invoked before the injury occurs, and its reach goes far beyond that of any individual dispute. Thus it can appropriately consider, and does consider, corrective (as opposed to compensatory) and prospective relief. It is this understanding that underlies the enactment of legislation setting forth general proscriptions and establishing administrative agencies empowered to fashion rules.

The nature of the political process also allows it to break free from the moorings of past discrimination to consider how best to correct the pervading realities of political isolation and economic subordination. The interests of a democratic society that cherishes domestic tranquility are ill-served by conditions which lock identifiable groups out of the political process and the economy. The society would be denied permanently the resources and perspective and contributions of these groups. Having neither an effective voice nor an economic stake in the society, the groups will have no reason to join the cause, share the costs, and recognize the limits which are a part of the fabric of the society.

It is appropriate and indeed imperative that these concerns be taken into account in the making of public policy. And it would be equally appropriate if the society chose to take positive steps to assure inclusion without demanding proof of some clear nexus between exclusion and past discriminatory conduct or current discriminatory processes. If affirmative action is seen as a partial response to the imperative to end political isolation and exclusion from the economic mainstream, many of the already tenuous arguments against it become completely untenable.

Once these clarifications are made and a framework for discussion established, supporters and critics alike could turn their attention to the questions which are matters of genuine concern. Assuming the legitimacy of affirmative action, when is it appropriate? Under what circumstance? To what extent? For how long? These questions deserve to be discussed and answered. Especially as to the last question, the absence of an answer proves unsettling even to some who stand strongly in favor of affirmative action. Few people are willing to argue that affirmative action must go on forever. Fewer still have managed to fashion a principle by which to allow it time to be effective and yet to limit its duration.

In his testimony before the Senate Subcommittee on Constitutional Rights, the former Cabinet member William Coleman suggested indices that would signal that affirmative action is no longer needed.

(1) Substantial equality in average wages between minorities and whites;

(2) Approximately equivalent rates of unemployment among minorities and whites;

(3) Substantial equality in housing conditions and opportunities;

(4) Substantial equality in admissions to institutions of higher education and professional schools;

(5) Substantial representation in membership in trade organizations and unions; and

(6) Substantial representation in corporate board rooms, banks, the guiding bodies of the major political parties, the Congress and state legislatures -- in short, in the positions of influence and power in our society, where basic economic and political decisions are made.

In Mr. Coleman's words, "When we can show as a nation, that we have made sufficient progress in meeting these criteria, then the remedy of affirmative action will no longer be an essential tool in realizing our constitutionally recognized values."[14]

Whether his approach is viable is a matter on which reasonable people can disagree. Mr. Coleman has in effect invited similarly concrete alternatives. In so doing, he may have initiated a useful dialogue and helped to implement this next most critical phase of affirmative action.

The United States Commission on Civil Rights has urged just such a responsible approach.

> A unifying and problem-solving approach to affirmative action that addresses the hard questions is needed now. It is time to consolidate the lessons learned from past studies, the case-by-case pragmatism of litigation, and a decade of experimentation and trial and error and develop an approach that gives concrete direction and assistance to ongoing and future affirmative action efforts.[15]

Eminently reasonable as this proposal is, the prospects for any such a development in the near future appear bleak.

Those who have problems with affirmative action continue to offer little in the way of constructive criticism. They seem content to issue salvos of destructive rhetoric. Rather than engaging in a dialogue as to how affirmative action could be made to work better, they appear more comfortable engaging in a guerrilla warfare so that it might not work at all. Feeling besieged by this sustained assault, many supporters resolve to defend affirmative action even at the cost of concealing the flaws and ignoring its blemishes.

The battle has gone on long enough. It must be brought to an end.

Those who oppose affirmative action should be challenged to put up or to shut up. They may have a better idea as to how to dismantle the process of discrimination and to end the isolation from the political process and the continued exclusion from the economic mainstream. If so, it should be put forward, measured against affirmative action and proven to work realistically, and realistically to work at least as well now. As evidenced by the testimony presented thus far to the Senate Subcommittee on Constitutional Rights, no such alternative is even being considered. Four of the most articulate opponents of affirmative action have managed to come up with only one idea among them. And that was Nathan Derskowitz's almost unintelligible proposal to continue affirmative action so long as it becomes "non race-specific".

Associate Justice Blackmun has responded to this as well as anyone could:

> I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way.[16]

The politicians have thus far done no better. Proposed amendments to the Constitution and to the various civil rights statutes that merely outlaw affirmative action are insufficient since they do not address in any way the underlying problems that called affirmative action into being in the first place. Nor is the appeal for some reaffirmation of a nude promise of equality of opportunity. That appeal requires the embracing of an approach that has not worked in the past, does not work now, and holds no promise of working in the future.

Unless different and better alternatives are forthcoming, then those who oppose affirmative action would do well to heed the words of Mr. William Raspberry, columnist for the Washington Post:

> " ... Some of us are wide-open to at least listen to conservative approaches for solving the problems that the liberal approaches have left unresolved. But so far we have listened in vain. What we get is the 1980's counterpart of the 1960's rioters whose notion was to tear the system down without any thought of what to put in its place. Finally, you want to shout at them to stop telling you what you've done wrong for all these years, and tell you what to do now to solve your problems. And if they don't know, maybe they should just admit it and go away."17/

Uncharitable as this might seem, Mr. Raspberry's might well be the most appropriate response.

V

While those who support affirmative action cannot afford to be cavalier about the opposition, we must not allow ourselves to be trapped in the quicksands of interminable debate. Of course, this is easier said than done. Endless debate over even the most modest efforts to deal with historic injury has become so commonplace as to seem required. The fact that the Congress of the United

States is even now debating the merits of desegregation in public education, housing and employment, the necessity of providing legal services to the poor and the importance of protecting the voting rights of minorities, underscores the futility of any attempt to achieve consensus around affirmative action. That alone is reason enough to disengage from the current debate.

But there are other reasons to move quickly beyond affirmative action. The struggle over affirmative action is consuming much of the attention, intellectual resources and political capital that are necessary to address the urgent problems of those who are now trapped in a permanent underclass.

Professor William Julius Wilson, in his provocative book The Declining Significance of Race,[18/] has reminded us of the growing number of families confronted with the poverty of generations and the reality of economic dislocation. These families are now structurally barred and permanently excluded from any hope of participation in a productive economy. This nation, committed as it is to strengthening its economy, strengthening its defenses and assuring its place in the world, ignores at its peril those who have been victimized by its legacy of slavery and history of oppression and who even now are condemned to a life of poverty, denied adequate housing, gainful employment, effective education, dignity and hope.

We must move beyond affirmative action because as Wilson reminds us, no matter how well affirmative action works it will not dissolve the structural barriers "resulting from labor-saving devices, industry relocation, labor-market segmentation and the shift from goods-producing to service-producing industries."

To move beyond affirmative action we must first get to affirmative action. It is true that affirmative action will neither house the homeless, nor employ the jobless, nor educate the illiterate. Affirmative action, however, could provide hope, where there is now hopelessness. Affirmative action can assure those who remain excluded that exclusion is not a permanent phenomenon because there will be a cadre within the political process and the economic mainstream to articulate their aspirations to advance their interests and to protect their rights.

In large measure, the arguments against affirmative action ignore the sad history that brought it forth.

These programs are not handouts or misguided products of noblesse-oblige. They represent the tangible manifestations of a political compromise. The first Executive Order was issued by President Roosevelt only after A. Philip Randolph threatened to have 100,000 blacks march on the nation's capital.[19/] That process, once set in motion, evolved only because at each step of the way Blacks were willing to agitate and demand and then settle for less than they deserved.

Blacks and other minorities were silent during the 1970's when the nation's economic malaise retarded the progress begun in the 1960's and inflicted upon the poor and the powerless a disproportionate burden of inflation, recession and stagflation. It would be a cruel irony that just as the new administration offers the promise of better days that society were to renege not only on its promises that things would get better but would also seek to unilaterally undo the progress made in the earlier decades.

The effort to destroy affirmative action amounts to a refusal to face difficult issues and to make tough choices. In this regard history repeats itself. This society is now confronted with a choice that has faced nearly every generation of Americans: Whether to move decisively to include blacks and similarly situated minorities into the body politic and into the economic mainstream or to ignore their plight and risk the consequences.

Each generation has found an excuse and rationalization for passing the problem on to the next.

The generations of the early 1800's refused to abolish chattel slavery and thus caused their children to fight and die in the Civil War.

The generations of the late 1800's were quick to abandon the modest efforts to ease the suffering and to protect the rights of the formerly enslaved blacks. In so doing, they occasioned untold human suffering for blacks and white alike.

The generations of the 1920's and 1950's refused to avail themselves of the opportunity to assure those who had fought to make the world safe for democracy that they and their children could safely exercise democratic rights at home. Our cities still bear the scars of the rebellion that ensued.

Now this generation can choose. It can commit to continuing affirmative action and then to moving beyond. Or it can hide behind the countless rationalizations and excuses and allow the problem to go unresolved into the next generation.

We know from experience that the interest on this historic debt is paid for in human misery. We know also that the institutions of the future are going to be strained severely as the nation attempts to cope with the reality of limited and shrinking national resources and to adjust and define itself in an ever-changing world. Knowing all this, it is grossly unfair and immoral to require the next generation to mortgage its future and risk its survival by passing on to them untouched and undiminished, the accumulated costs of two centuries of discrimination and deprivation, isolation and exclusion.

NOTES TO TEXT

1. United Steelworkers of America v. Weber, 440 U.S. 954 (1979).

2. Detroit Police Officers' Assn. v. Young, 446 F. Supp. 979 (E.D. Mich. 1978): vacated and *rev'd.*, 608 F.2d 671 (6th Cir. 1979).

3. *Id.* at 696.

4. This brief was submitted on behalf of Citizens for Affirmative Action in Detroit (CAADET), an unincorporated, voluntary Association of Detroit-based civic and professional organizations. CAADET's twenty-six constituent organizations represent a broad spectrum of the City's populace, which are joined together by a firm commitment to support and advance affirmative action concepts and programs to assure true equality of opportunity in the City of Detroit. Brief of *amicus curiae* in *Detroit Police Officers Assn. et al.* v. *Coleman A. Young et al.* (6th Cir., No. 78-1163).

5. *Id.* at 45.

6. Letter dated June 5, 1981 to David Stockman, Office of Management and Budget, signed by the following: Lane Kirkland, President, American Federation of Labor and Congress of Industrial Organizations; Johanna Mendelson, Director of Public Policy, and Amy Berger, Public Policy Assistant, American Association of University Women; Patsy Mink, President, Americans for Democratic Action; William Lucy, President, Coalition of Black Trade Unionists; Winn Newman, General Counsel, Coalition of Labor Union Women; Janet Beaudry, Chairperson, East Tennessee Coalmining Women's Support Team; Marylouise Uhlig, National President, Federally Employed Women; Nancy Felipe Russo, President, Federation of Organizations for Professional Women; Richard Lowe, Associate Director, Institute of Public Representation; Douglas Fraser, President, International Union UAW: William L. Robinson, Director, Lawyers Committee for Civil Rights Under Law; Ralph Neas, Director, Leadership Conference on Civil Rights; Dorothy S. Ridings, First Vice President, League of Women Voters of the United States; Stephen Ronfeldt, Directing Attorney, Legal Aid Society of Alameda County; Antonia Hernandez, Associate Counsel, Mexican American Legal Defense and Educational Fund; Wilma Espinoza, President, Mexican American Women's National Association; Jack Greenberg, Director Counsel, NAACP Legal Defense and Educational Fund, Inc.; Benjamin L. Hooks, Executive Director, National Association for the Advancement of Colored People; Wilhelmina Rolark, President, National Association of Black Women Attorneys; John Crump, Executive Director, National Bar Association; Frederick L. Jones, Executive Director, National Black Veterans' Organization; Lauren Anderson, Associate Director, National Conference of Black Lawyers; Gerri Traina, Co-Director, National Congress of Neighborhood Women; Dorothy Height, National President,

National Council of Negro Women; Ann Kolker, Associate Director, Washington Office, National Employment Law Project; Eleanor Smeal, President, National Organization for Women; Vernon Jordan, President, National Urban League; Iris Mitgang, National Chair, National Women's Political Caucus; Robert L. Becker, Staff Attorney, Puerto Rican Legal Defense and Education Fund; Samuel M. Church, Jr., President, United Mine Workers of America; Jane P. Fleming, Executive Director, Wider Opportunities for Women; Day Piercy, Executive Director, Women Employed; Norman Spector, National Coordinator, Women for Racial and Economic Equality; Carol Grossman, President, Women's Equity Action League; Judith Lichtman, Executive Director, Women's Legal Defense Fund; Karen Nussbaum, President, Working Women; Karen Sauvigne, Program Director, Working Women's Institute.

7. Executive Order 11246 requires that all government contractors and subcontractors take affirmative action in hiring, requiring an affirmative action clause in every contract with the government in excess of $50,000 or 50 or more employees. §202(1), 3 C.F.R. 169 (1974), reprinted following 42 U.S.C. §2000(E) (1970), amended by Executive Order 11375, 32 Fed. Reg. 14303 (1967). In 1971 it was estimated that the federal government spent approximately $70 billion in procurement, with the contracts involving approximately one third of the U.S. work force. *See note*, Executive Order 11246: Anti-Discrimination Obligations in Government Contracts, 44 N.Y.U.L. Rev. 590, 1969. Recent proposed regulations would significantly raise the dollar amounts (and employee numbers in contracting business), drastically reducing the number of contractors subject to Executive Order 11246.

   Somewhat analogous "affirmative action" provisions are an integral part of the enforcement mechanisms under Titles VI and IX of the Civil Rights Act of 1964 and §504 of the Rehabilitation Act of 1973.

8. 416 U.S. 312 (1974).

9. 438 U.S. 265 (1978).

10. *Supra* note 1.

11. 163 U.S. 537 (1896).

12. 347 U.S. 483 (1954).

13. Thomas Sowell, *Weber and Bakke, and the Presuppositions of Affirmative Action*, 26 Wayne L. Rev. (No. 4) (1980) at 1326.

14. Statement of William T. Coleman, Jr., Chairman, NAACP Legal Defense and Educational Fund, Inc., "In Re Affirmative Action to End the Effects of Racial Discrimination and Segregation"

before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, Washington, DC., June 11, 1981.

15. U.S. Commission on Civil Rights, A Proposed Statement, Affirmative Action in the 1980's, Dismantling the Process of Discrimination, Clearinghouse Publication No. 65, January 1981.

16. Supra note 9, at 407.

17. Washington Post, Feb. 23, 1981.

18. William Julius Wilson, The Declining Significance of Race: Blacks and Changing American Institutions, Chicago: University of Chicago Press, 1978. See also The Declining Significance of Race? A Dialogue Among Black and White Social Scientists, Joseph R. Washington, ed., University of Pennsylvania Afro-American Studies Program Symposium, 1979.

19. The best analysis of the further development of affirmative action is John E. Fleming's The Lengthening Shadow of Slavery, A Historical Justification for Affirmative Action for Blacks, published in 1976 under the auspices of the Institute for the Study of Educational Policy at Howard University (ISEP). ISEP has conducted the most extensive research in this area and has published a series of comprehensive books, the latest of which is Dr. Lorenzo Morris' Elusive Equality: The Status of Black Americans in Higher Education. Other ISEP publications which are helpful in this area are Equal Educational Opportunity for Blacks in U.S. Higher Education: An Assessment (Howard University Press); Directory of National Sources of Data on Blacks in Higher Education, 1976 Edition; Proceedings from the National Invitational Conference on Racial and Ethnic Data, Elizabeth A. Abramowitz, ed.; The Changing Mood in America: Eroding Commitment? by Faustine C. Jones (Howard University Press); Higher Education's Responsibility for Advancing Equality of Opportunity and Justice by James E. Cheek (First ISEP Occasional Paper); The Bakke Case Primer; Advancing Equality of Opportunity: A Matter of Justice, Cynthia J. Smith, ed.; The Case for Affirmative Action for Blacks in Higher Education by John Fleming and David Swenson (Howard University Press).

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Industrial Relations Section

October 12, 1981

The Honorable Augustus F. Hawkins
Chairman
Subcommittee on Employment Opportunities
Committee on Education and Labor
House of Representatives
Congress of the United States
B-346A Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Hawkins:

I am submitting a brief statement to be included as a part of the official record of the hearings by the Subcommittee on Employment Opportunities. Your letter of September 14, 1981 specified that such testimony should be received not later than October 9. I regret that my hectic schedule at M.I.T. did not permit an earlier response.

Sincerely,

Phyllis A. Wallace

Phyllis A. Wallace
Professor of Management

PAW/jy

October 12, 1981

Statement Of
Dr. Phyllis A. Wallace
Professor of Management
Alfred P. Sloan School of Management
Massachusetts Institute of Technology
before the
House Sub-Committee on
Employment Opportunities

Title VII of the Civil Rights Act of 1964 as amended by The Equal Employment Opportunity Act of 1972, prohibits employment discrimination on account of race, color, religion, sex, or national origin. Implementation of this law as well as other Federal regulations to reduce discrimination in labor markets has been criticized both by those opposed to any regulation of market processes as well as by those who perceive a significant gap between promise and achievement of equal employment opportunity. It was apparent from the Congressional debate prior to the passage of the 1964 Act that the overwhelming concern was with the economic status of blacks in American society. Thus, my comments are restricted to employment discrimination on account of race.

During the past sixteen years there has occurred an enormous proliferation of minority groups seeking protection under the Title VII umbrella or other employment discrimination laws. A recent article in The Wall Street Journal indicated an "explosive growth" in age discrimination suits.[1] Expansion of the protected groups and their increase as a percent of the total work force took place while the overall economy experienced recessions and high levels of unemployment. Reliable evidence is lacking that some participants in the labor market received preferential treatment and benefitted at the expense of non-protected groups.

Many questions have been raised about the techniques used to remedy job discrimination whether inadvertent or not. At a time when the private sector pursues aggressive strategies of management by objectives, quantitative analysis, and emphasis on the impact on the "bottom line," it is not strange that those attempting to assess equity goals should apply similar measures of efficiency.[2] However, protected groups and individuals rarely have available to them the extensive documentation needed to replicate a human resource management system.

Much controversy surrounds the definition of affirmative action. Is it merely the establishment of timetables and objectives as specified in the regulations for federal contractors or does it also encompass funding of employment and training programs to a segment of the work force that is severely disadvantaged? What have been the successes as well as the failures of affirmative action?

After sixteen years of attempting to refine effective techniques to assure equal employment opportunity for minorities and women, we think that the goal will not be achieved for decades,[3] but some, not entirely disruptive, beneficial changes in selected industries and companies have taken place. The desirable setting is where participants in the labor markets voluntarily take special action to reduce employment and income disparities and to upgrade occupational position. The Weber v. Kaiser Aluminum and Chemical Corp. decision in 1979 can be viewed as a victory for voluntary compliance as a means of accommodating diverse interests in the workplace. Weber emphasized that private settlement without litigation is central to Title VII.[4] Negotiated settlements (consent decrees) represent another approach which might be preferable to protracted court action.

A review of outcomes of several of the recent consent decrees reveals progress that would not have occurred without affirmative action. Two such case studies are the steel consent decree of 1974 and the AT&T consent decree of 1973. We have before and after data for both basic steel and the telephone operating companies. The experience of the basic steel industry during the first four years of its consent decree reveals that black representation in the trade and craft jobs increased, and the increase was greater than pre-consent decree employment trends would have predicted.[5]

Tables 1 and 2 show the redistribution of minorities and women before and at the end of the implementation of the consent decree. The occupational upgrading for both groups was considerable. Access to and analysis of large data sets collected by the EEOC, OFCCP and some of the firms involved would shed more light on the effectiveness of affirmative action. It is time that serious appraisals be substituted for heated debates.

TABLE 2

Employees in Bell Telephone Operating Companies

December 31, 1972 and September 30, 1978

AAP Job	Description	Total 1972	Total 1978	Total % Change	Women 1972	Women 1978
1	Middle management and above	15,780	17,711	12.2	338	1,374
2	Second level management	43,138	52,415	21.5	4,830	11,078
3	Entry level management	95,949	116,458	21.4	29,543	40,976
4	Administrative	32,716	32,468	-0.7	27,380	24,774
5	Salesworkers non-management	5,813	8,455	45.5	1,539	3,720
6	Skilled craft (outside)	65,107	70,804	8.9	38	1,928
7	Skilled craft (inside)	76,542	74,584	-2.6	2,619	8,830
8	General service (skilled) a/	11,347	703	-93.8	540	176
9	Semiskilled craft (outside)	66,104	63,767	-3.6	206	3,386
10	Semiskilled craft (inside)	18,011	21,907	21.6	3,554	7,779
11	Clerical, skilled	82,392	104,065	26.3	77,633	91,206
12	Clerical, semiskilled	74,609	87,030	16.5	73,409	79,453
13	Clerical, entry level	45,140	34,890	-22.8	42,929	30,400
14	Telephone operators	148,622	104,134	-29.9	146,562	96,348
15	Service workers, entry level	12,365	10,296	-16.7	4,641	4,254
Total		793,715	799,785	0.8	415,761	405,682
Percent of Total					52.4	50.7

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a/ Later dropped from the classification.

Source: Final Report to the Court of the AT&T Consent Decree

© Phyllis A. Wallace (editor), *Women in the Workplace*, Auburn House Publishing Co., Boston, Mass., Fall 1981.

Minority Employees in Bell Telephone Operating Companies
Dec. 31, 1972 and Sept 30, 1978

P. Wallace

AAP Job	Description	Minority Men 1972	Minority Men 1978	Minority Women 1972	Minority Women 1978
1	Middle mgt and above	129	375	5	81
2	Second level mgt	536	1798	183	1151
3	Entry level mgt	2260	6175	2285	6838
4	Administrative	399	890	2737	4600
5	Sales workers non-mgt	287	694	156	801
6	Skilled craft (outside)	2701	6242	1	319
7	Skilled craft (inside)	4776	5802	238	1459
8	General services (skilled) a)	2764	220	114	51
9	Semiskilled craft (outside)	7554	7172	24	642
10	Semiskilled craft (inside)	3203	3031	496	1815
11	Clerical, skilled	666	2605	11005	19,916
12	Clerical, semiskilled	437	2176	13,988	22,976
13	Clerical, entry level	892	1260	11,100	8963
14	Telephone operators	543	1997	34,770	24,347
15	Service workers, entry level	3462	2224	1549	1429
	Total	30,609	42,681	78,651	94,888
	% of Total Employs	3.9%	5.3%	9.9%	11.9%

a) Later dropped from classification

Source: Final Report to the Court of the AT&T Consent Decree

Footnotes

1. Robert S. Greenberger, "Fired Employes (sic) in 40's Filing More Bias Suits," The Wall Street Journal, October , 1981.

2. See Alfred W. Blumrosen, "The Bottom Line Concept in Equal Employment Opportunity Law," North Carolina Central Law Journal, Vol. 12, fall 1980, No. 1.

3. In an exchange between the bench and an industrial relations official in Weber v. Kaiser, an estimate of thirty years was given as the time required to have the internal labor market of the Gramercy Plant fully reflect blacks represented in the external labor market, Kaiser Aluminum and Chemical Corporation v. Brian Weber Brief for Petitioner, p. 53.

4. Phyllis A. Wallace, The Weber Case and Collective Bargaining, Sloan School Working Paper WP#1091-79, November 1979.

5. Casey Ichniowski, Have Angels Done More? Sloan School Working Paper WP#1211-81, April 1981.

Associated Builders and Contractors, Inc.

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October 23, 1981

The Honorable Augustus F. Hawkins
Chairman
Subcommittee on Employment Opportunities
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Associated Builders and Contractors submits the enclosed statement on affirmative action. It will be appreciated if this statement is included in the official record of your hearings on this proposal.

Respectfully submitted,

John H. Reed

John H. Reed
Director
Government Relations

cc: Members, Committee on Education and Labor

Enclosure

Merit Shop Builds Best

Statement of
Associated Builders and Contractors

Associated Builders and Contractors (ABC) is a national construction industry trade association representing more than 16,000 firms nationwide. The members of ABC believe in the "merit shop" philosophy of awarding construction contracts to the lowest responsible bidder. Today, more than 60 percent of all construction in this country is done the merit (open) shop way.

A recent survey of ABC members by the Opinion Research Corporation showed that 45 percent of those members do work for the federal government. They, thus, become subject to the rules and regulations of the Office of Federal Contract Compliance Programs (OFCCP).

OFCCP administers the enforcement of Executive Order 11246, which prohibits employment discrimination by government contractors based on race, color, sex, religion, or national origin and mandates affirmative action in employment. OFCCP also enforces section 503 of the Rehabilitation Act of 1973 and section 402 of the Vietnam Era Veterans Readjustment Act which require federal contractors to employ and advance in employment handicapped, disabled veterans and Vietnam-era veterans.

ABC wants to make clear from the beginning that we support the principles embodied in our equal employment opportunity laws. We believe that discriminatory practices which deny individuals the opportunity of learning skills or working in the construction industry are legally, economically, and morally harmful to our nation and our industry.

In addition, ABC supports the recruitment and training of minorities and women because of the critical shortage of skilled labor in the construction trades. The United States currently produces only 50,000 skilled construction workers a year, less than 25 percent of the number needed. The problem may become more serious as the U.S. Bureau of Labor statistics projects a possible shortage of 1.9 million skilled construction workers by 1990.

Thus, ABC has become increasingly concerned with the failure of OFCCP to fulfill its commitment. OFCCP seems to have lost sight of the basic mission of the program - to promote the recruitment, training and hiring of minorities and women. Instead, it has polarized parties on affirmative action issues by instituting an adversarial, and sometimes arbitrary, approach to enforcement of its rules and regulations. As a result, OFCCP has become a prime target for the frustration and anger of the business community in general and the construction industry in particular.

ABC believes that the basic elements of affirmative action are recruitment, training, and hiring. None of these elements can stand alone. OFCCP, however, has focused almost entirely on the third element, hiring, to the detriment of the affirmative action program.

The general perception that OFCCP pays little attention to legitimate business concerns has lead ABC to the belief that it is time to reexamine the fundamental concepts which underlie the government's present approach to affirmative action. ABC urges Congress and the Department of Labor (DOL) to take this opportunity to develop and implement a proper regulatory strategy emcompassing all three elements of affirmative action.

OFCCP's Policies Conflict with other Agencies

Each year approximately 45 percent of ABC's members acquire federal or federally-assisted construction projects. They thereby become directly subject to the rigorous rules and regulations of the OFCCP, the Bureau of Apprenticeship and Training (BAT), and the Wage and Hour (the Davis-Bacon Act requirements) Division of DOL. No federal agencies have greater impact on the construction contractor's hiring and employment practices than these three. Yet these agencies have implemented regulations and policies which work at cross-purposes to each other and obstruct affirmative action for women and minorities.

Construction employment averaged about 4.5 million during 1980. In the same year, minorities accounted for 9.18 percent and females accounted for 1.57 percent of the blue-collar construction labor force. (See Table A.) There are not now sufficient numbers of minorities and women in the construction labor force to meet the goals imposed by OFCCP. The program has thus created a need to bring unprecedented numbers of untrained individuals on to construction job-sites in an extemely short period of time and the need to train such individuals commensurate with the productivity and safety factors so vital to construction competition. But an examination of the current system of training for entry into the construction crafts clearly reveals that it is incapable of meeting these needs.

Pursuant to the Davis-Bacon Act and DOL's implementing regulations (29 C.F.R. Part 1), no federally-involved construction contractor is permitted to pay a worker less than the prevailing journeyman wage rate unless the individual is in a training program registered in conformity, with BAT regulations. As a result of these regulations, the only realistic source of workers-in-training on federal and federally-assisted construction projects is through apprenticeship programs approved by BAT.

In 1979, women accounted for 2.56 percent (4,323) of the 168,590 apprentices in the registered building and construction trades programs for 15 different trades. (See Table B.) It takes an average of 3 1/2 years for an entering apprentice to graduate to journeyman.

Local apprenticeship programs, under the current BAT requirements (29 C.F.R. Part 30), are obligated to enroll females at one-half the percentage which women comprise the total work force in each Standard Metropolitan Statistical Area (SMSA). Assuming women average 50 percent of the work force, then 25 percent, or one of every four new apprentices, must be female. This means that for compliance under the apprenticeship regulations, 17,000 females need to be placed in a first year apprenticeship class of 68,000.

With 310,500 women needed to meet the overall goals but only 17,000 needed for the apprenticeship goals, the construction industry obviously faces a problem. Even if local apprenticeship committees doubled their intake of women (in excess of the requirements of 29 C.F.R. Part 30), the goals for females imposed by OFCCP cannot be met. In fact, the construction industry could not meet OFCCP goals for women through existing apprenticeship even if all new apprenticeship slots were reserved exclusively for women.

And this, of course, would not resolve the problem of meeting OFCCP goals for minorities!

Table A
Minority and female construction workers as a percent of blue-collar occupational groups
1979-1980

	Black and other		Female	
	1979	1980	1979	1980
Craft and kindred workers	6.92	7.25	1.03	1.27
Operatives, except transportation	8.48	7.59	1.65	2.09
Transportation equipment operatives	14.76	15.35	1.42	1.55
Nonfarm laborers	17.90	16.34	2.38	2.62

SOURCE: BLS, Employment and Earnings, January 1981 and January 1980, Tables 27-28.

Table B
Apprentices in Registered Building Trades Programs
as of June 1979

Trade	Total apprentices	Female apprentices	Percent female apprentices
Asbestos Workers	1,174	23	2.0
Boilermakers	4,083	47	1.2
Bricklayers	8,462	120	1.4
Carpenters	43,332	1,429	3.3
Cement Masons	3,118	138	4.4
Electricians	34,584	814	2.4
Glaziers	1,160	8	0.7
Iron Workers	8,296	103	1.2
Lathers	1,483	16	1.1
Operating Engineers	6,051	419	6.9
Painters	6,760	425	6.3
Pipe Fitters, Steam Fitters & Sprinkler Fitters	15,634	345	2.2
Plumbers	17,554	176	1.0
Roofers	5,745	57	1.0
Sheet Metal Workers	11,154	203	1.8

SOURCE: U.S. Department of Labor, Annual Construction Industry Report, April 1981, page 5.

It is obvious in view of the substantial requirements OFCCP has imposed on the construction industry, DOL must support the development of innovative and untraditional programs for the recruiting and training of minorities and women. ABC urges DOL to develop and implement a program to identify potentially qualified applicants in connection with the affirmative action obligations of government contractors and subcontractors. One such program is discussed infra.

In addition, ABC recommends that DOL expand the difinition of "apprentice" contained in the Davis-Bacon regulations (29 C.F.R. 5.2(n)(1)) to include those individuals who are registered in a state, local, or other federal agency-approved training program. It is apparent that DOL's long-standing policy of allowing only BAT-approved programs has the effect of preventing unregistered, entry-level minority and female persons from entering the construction industry.

Finally, ABC recommends that DOL promote the development of innovative training programs in the construction industry. One such program is "Wheels of Learning", a competency-based, task-oriented training program in 21 construction trades. "Wheels of Learning" is being developed by ABC to provide the construction industry with a comprehensive craft training program, which will teach usable skills in a timely manner, in a convenient location, and at a relatively low cost. (See Appendix A for a more in-depth discussion of ABC's "Wheels of Learning" Program.) ABC looks forward to working with DOL to assist them in developing and implementing such a program.

Coverage Thresholds for the Construction Industry (Section 60-4.2)

The current OFCCP regulations subject all federal and federally-assisted construction contractors who have contracts which meet the basic coverage threshold (a contract in excess of $10,000) to the requirements in Part 60-4 including specific minority and female utilization goals and sixteen affirmative action steps.

In OFCCP's proposed regulations of August 25, 1981, OFCCP contemplates the establishment of a two-tiered threshold system which would provide that contractors with federal or federally-assisted construction contracts in excess of $10,000 be contractually subject only to a commitment not to discriminate and to take affirmative action. These contractors would not be subject to specific goals and timetables and would not be required to take the specified affirmative action steps.

The second tier would apply to contractors with a federal or federally-assisted construction contract of $50,000 or more and which, for six consecutive months during the twelve months immediately preceding the contract award, the contractor employed craft workers for a total of 20,000 or more hours. OFCCP estimates that this work requirement reflects 20 full-time workers employed over a six-month period.

The threshold levels proposed by OFCCP are too low to effectively reduce the compliance burden on small contractors, and would exempt a de minimis number of construction projects from the nine step requirement.

ABC recommends that, if a tiered system is implemented, the threhsold levels be expanded to three levels, with additional compliance responsibility as the size of business and the contract amount increase:

Level I

<$500,000 total annual volume of business (over three years)

AND

<$100,000 in federal contract.

If both of these are met, contractor must:

- Sign an affirmative action clause

Level II

$500,000 - $5 million total annual volume of business (over three years)

AND

$100,000 - $1 million in federal contract.

If both of these are met, contractor must:

- Sign affirmative action clause
- Make "good faith" effort to meet goals
- File EEO-1 report
- If goals are not met, file narrative report

Level III

>$5 million total annual volume of business (over three years)

AND

>$1 million in Federal contract

If both of these are met, contractor must:

- Sign affirmative action clause
- Make "good faith" effort to meet goals
- File Form 257 utilization report quarterly
- Follow nine steps

This approach would be in keeping with the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) by appropriately placing the compliance burden on larger companies which can more effectively and efficiently comply with the regulatory burden. Pursuant to the Regulatory Flexibility Act of 1980 (RFA), DOL must consider regulatory alternatives, consistent with the stated objectives of applicable statutes, which provide for "differing compliance or reporting requirements or timetables" that take into account the resources of small businesses (5 U.S.C. 603(c)(1)). The term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration (SBA) and after opportunity for public comment, establishes definitions of such term (5 U.S.C. 601 (3)). Reading these two sections of the RFA together, it would be most appropriate and warranted for DOL to adopt ABC's recommended thresholds since they are consistent with SBA's definition of "small business concern" and in accordance with the provisions of the RFA.

Unvalidated Goals (Section 60-4.6)

OFCCP does not require construction contractors to set goals and timetables or develop their own written affirmative action plans. Instead, OFCCP mandates utilization (or employment) goals for construction contractors. With its April 1978 regulations, OFCCP published various minority goals for different geographic areas and a nationwide goal for females. On November 3, 1980, OFCCP revised its minority hiring goals. The new goals are based upon minority workforce presence in SMSA's and Economic Areas (EA). A single minority goal covers all crafts in an SMSA or EA, and each SMSA and EA has a separate goal. The nationwide goal for women is currently 6.9 percent.

ABC submits that neither the minority nor the female goals are attainable under the conditions imposed on the construction industry by the federal government (as discussed supra). ABC further submits that OFCCP is and has long been aware of the discrepancy between its goals and reality.

OFCCP's goals for the construction industry were promulgated in response to pressures on DOL by a series of law suits filed against DOL by women's groups in 1976. In testimony before the House Labor-HEW Appropriations Subcommittee on February 5, 1980, OFCCP Director Weldon Rougeau stated,". . . the goals in the construction progam are goals which we admit are not necessarily based on hard data which has been obtained by the Department or any other groups." At the same hearing, in response to a question about whether women trained in construction crafts are available in sufficient numbers, Director Rougeau stated, "Overall, no, not to meet all of our nationwide goals in every craft throughout the nation. We have known this for a long time." In testimony before the same subcommittee on February 6, 1980, Secretary of Labor Ray Marshall stated that there is "no scientific way to set goals."

The goals promulgated by OFCCP for the construction industry have no statistical basis and were arbitrarily established. The goals fail to take into consideration the variety of skills and different levels of training required for the various trades in the construction industry. OFCCP's regulations provide that all affected contractors in a SMSA must meet the same hiring goals. Subcontractors and specialty contractors engaged in the hard-to-learn trades, those with long apprenticeship periods such as electrical and plumbing which have the greatest difficulty attracting minority and female trainees, realistically cannot meet the same hiring goals as other building craft employers.

If OFCCP mandates the use of goals, instead of setting across-the-board goals, OFCCP should set minority and female goals for each trade based on the availability of trained minorities and owmen in each SMSA or EA. OFCCP has set criteria for determining and implementing goals for service and supply industries (60-2.ll). These criteria include:

- The size of the minority/female unemployment force in the labor area surrounding the facility;
- The percentage of the minority/female work force as compared with the total work force in the immediate labor area;
- The general availability of minorities/females having requisite skills in the immediate labor area;
- The availability of minorities/females having requisite skills in the area in which the contractor can reasonably recruit;
- The existence of training institutions capable of training persons in the requisite skills;
- The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities/women.

While it would be difficult, if not impossible, for each contractor to set goals and time tables for each project, OFCCP should use these same criteria for establishing and implementing goals in the construction industry.

OFCCP's regulations for service and supply industries also provide that:

> ". . . an establishment shall be presumed to have reasonably utilized minorities and women, and shall not be required to explain if minorities and women are being underutilized or to establish goals and timetables, for job groups in which the employment of minorities and women is at least 80% of their availability" (60-2.11). (Emphasis added).

ABC urges OFCCP to apply this provision to the construction industry.

OFCCP regulations also provide that minority hiring goals will be updated dicenially. Contractors and subcontractors in SMSAs that experience large gains in their minority population over the ten-year period since the previous Census Report will be compelled to meet a sharply higher updated hiring goal, causing a significant displacement in the local construction workforce. OFCCP regulations should be amended to phase-in these updated minority hiring goals.

OFCCP regulations provide that when 1980 census data becomes available, affected contractors and subcontractors must provide for "appropriate participation rates for minority subgroups" such as Blacks, Hispanics, Orientals, Eskimos, and Aleuts by setting a separate hiring goal for each. Paperwork requirements, of course, will increase commensurately. Separate hiring goals for racial and ethnic subgroups would unnecessarily increase the regulatory burdens of contractors, and thus, should not be implemented.

Use of Quotas

OFCCP has taken the position that its minority and female utilization goals are only a standard by which to measure a federal contractor's "good faith" affirmative action effort. In reality, these "goals" are enforced as quotas.

According to current OFCCP procedures, a contractor who has not met his "goals," but has complied with the 16 affirmative action steps should be found in compliance. Such compliance requires sufficient documentation of contractor efforts under the 16 steps. Unfortunately, OFCCP standard operating procedures provide no definition concerning sufficient documentation of the 16 steps. If a contractor is not meeting his goals, OFCCP assumes that he cannot possibly be doing enough paperwork and documentation to be in compliance. Thus, Federal contractors are reviewed with the absolute expectation that OFCCP "goals" are met.

The nine steps in section 60-4.3 of the proposed regulations contain still another example of OFCCP's use of "quotas." In step "c," OFCCP proposes to require each contractor to "assign two or more women to each construction project." The use of a specific number is surely a quota.

Contractors who fail to meet their "goals" are usually required to sign a conciliation agreement. Such agreements cite the contractor's failure to meet a "goal" as a "deficiency." OFCCP even labels the "goals" in its conciliation agreements as "required goals."

ABC believes OFCCP should take action immediately to end the use of quotas in its affirmative action program. At a minimum OFCCP should amend its regulations to clearly state that a contractor's failure to meet the "goals" alone should not constitute a basis for any administrative action. Further, OFCCP staff should constantly be reminded of this policy.

The Affirmative Action Steps (Section 60-4.3)

In April 1978, OFCCP published revised affirmative action regulations for federal construction contractors. Instead of requiring construction contractors to adopt a written affirmative action plan, federal contract specifications were amended to include 16 steps. These steps include keeping lengthy lists of minority and women's groups, subcontractors, and suppliers; constant notification and recordkeeping on each new project or business development; and an extraordinary amount of documentation, including letters, memoranda, telephone logs, and more to prove compliance. All contracts over $10,000 include a listing of over 40 individual operations that must be taken and documented, at a minimum, to show "good faith" effort to meet minority and female utilization goals. For example, a contractor must:

1. Maintain documentation of good faith efforts to employ one woman for every 20 skilled trades persons;

2. Maintain documentation that all foremen maintain a working environment free of harassment;

3. Maintain a current listing of recruitment sources for minority and female craft workers;

4. Maintain copies of letters to recruitment groups specifying employment opportunities;

5. Maintain records of all responses received to letters to recruitment groups;

6. Maintain a separate file for every recruitment group contacted;

7. Maintain a file of names, addresses, telephone numbers, and craft of minority and women applicants and a record of what action was taken with respect to each, including reasons why any applicant was not hired;

8. Maintain written records of contacts (written, telephonic, or personal) with minority and women's community organizations and recruitment sources, and schools and training organizations;

9. Maintain copies of letters sent to community organizations, recruitment sources, schools and training organizations at least one month prior to acceptance of applicants for training, describing openings, screening procedures, and tests to be used in the selection process;

10. Maintain copies of diaries, telephone logs, or memoranda indicating contact with minority and women employees requesting assistance in recruiting other minorities and women;

11. Maintain records of results from contracts under #10;

12. Maintain records of contributions in cash, equipment, or personnel to DOL sponsored training programs;

13. Maintain records of hiring of minorities and women from DOL sponsored training programs;

14. Maintain copies of letters to minority and women recruitment sources informing them of DOL training programs;

15. Maintain a written equal employment opportunity policy, including identification of the EEO officer;

16. Include EEO policy in the company's policy manuals;

17. Post a copy of the EEO policy at all job sites;

18. Maintain documentation that EEO policy has been discussed with every minority and woman employee;

19. Maintain documentation that EEO policy has been discussed regularly at staff meetings;

20. Have copies of newsletters and annual reports that include the EEO policy;

21. Send copies of letters at least every six months or at the start of every new major contract to all recruiting sources stating the company's EEO policy;

22. Maintain copies of advertising with EEO statement;

23. Maintain copies of letters to all subcontractors and suppliers requiring compliance with EEO policy;

24. Maintain records of annual reviews of minority and female employees for promotional opportunities;

25. Maintain records of encouragement of minority and female employees to seek promotions;

26. Maintain records of annual review with supervisory personnel of affirmative action obligations, including identification of time and place of meetings, persons attending, subject matter discussed, and disposition of subject matter;

27. Maintain certifications that testing, interviewing, and selection procedures meet government guidelines;

28. Maintain documentation that the EEO officer reviews all monthly workplace reports, hirings, terminations and training;

29. Have a written job description for the EEO officer including the duty to monitor all employment activities for discriminatory effects;

30. Maintain documentation that corrective action has been taken whenever a possible discriminatory effect is found;

31. Include in all subcontracts and purchase orders a government "Certification of Nonsegregated Facilities;"

32. Maintain records that prove that notices of parties and picnics have been posted and are available to all employees;

33. Maintain records of contacts with supervisors to insure privacy between the sexes with respect to toilets and changing facilities;

34. Maintain records of all contacts from minority or women subcontractors;

35. Maintain records of assistance provided to minority or women subcontractors in preparing price quotations;

36. Maintain records of all minority or female subcontracts awarded, with dollar amounts;

37. Maintain copies of solicitation to minority or female subcontractors for projects bid;

38. Submit reports to the government regarding EEO activities;

39. Maintain records for each employee of name, address, telephone number, trade, social security number, race, sex, position, dates of change in position, hours worked per week, rate of pay, and locations of work; and

40. File a monthly employment utilization report, covering work force on private projects in the area.

Failure to document just one step can result in a finding of noncompliance requiring the contractor to sign a conciliation agreement containing even more reporting requirements or face potential debarment.

The incredible paperwork burden imposed by these regulations substantially increases the overhead of federal construction contractors. A recent survey of ABC members revealed that E.O. 11246 creates an average of an additional 16 hours of paperwork each month and increases administrative costs by an average of 13.6 percent (See Table C).

Table C
Impact of Paperwork Required
by Executive Order 11246

	General Contractors	Heavy Contractors	Specialty Contractors	Average
Increased administrative costs due to the E.O.	13.2%	15%	13.6%	13.6%
Hours spent on paperwork	18.7 hrs.	30.9 hrs.	11.7 hrs.	16 hrs.

SOURCE: March 19, 1981 Survey of the Membership of Associated Builders and Contractors.

Small contractors, when faced with the recordkeeping and reporting requirements imposed by OFCCP, are unable to effectively compete on federal work. These small businesses, which usually have a small labor force and offer limited job opportunities, incur administrative costs which are far greater than any gain in minority and female employment opportunities.

In the proposed regulations, OFCCP attempts to reduce the paperwork and reporting burdens of the program by permitting the contractor to "demonstrate" rather than "document" its actions under the steps. However, the term "demonstrate" and how it differs from "document" is unclear.

The proposed regulations also reduce the current 16 affirmative action steps to nine steps. However, this reduction in steps is achieved largely through consolidation rather than elimination.

With respect to the nine steps, ABC specifically recommends that OFCCP:

- Delete any reference to a specific number in step "a." The step requires a contractor to "assign two or more women to each construction project" where possible. This requirement is not only impractical, it is a quota (See discussion supra).

- Replace in step "h," the phrase "not later than one month" with "at a reasonable time." The provision refers to the time a contractor must send information to organizations with respect to apprenticeship and training opportunities. ABC believes the suggested change would make the regulatory process less cumbersome and more reasonable.

ABC welcomes OFCCP's attempt to reduce the mindboggling compliance and paperwork requirements for construction contractors. However, we believe that something more must and can be done to reduce these burdens without adversely affecting basic affirmative action objectives in the construction industry.

Many of the paperwork requirements involve outreach and recruiting efforts. ABC believes that a much more effective and efficient program of outreach and recruiting can be implemented through state employment service offices around the country, all under the umbrella of the U.S. Employment Service. These offices should develop ongoing working relationships with education and training organizations and community groups in order to develop lists of qualified applicants. Contractors could then simply solicit referrals from the Employment Service. This system would be more effective than the haphazard scheme of each contractor individually trying to search out the groups and develop confidence in the quality of referrals. This would also reduce the compliance and paperwork burdens for the contractors to a more rational level.

Under this linkage system, a contractor would satisfy his affirmative action outreach obligations by soliciting referrals from the Employment Service and by considering in "good faith" these referrals for employment. As under current rules, an employer would retain full authority to decide whether the individuals referred are qualified. While there would be no presumption that referrals are necessarily qualified for particular jobs, an employer would have to consider all referrals in "good faith."

Application to Private Work (Section 60-4.3)

The proposed regulations provide that "(c)overed construction contractors performing construction work in geographical areas where they do not have a Federal or federally assisted construction contract shall apply the minority and female goals established for the geographical area where the work is being performed." This provision requires federal contractors to meet minority and female goals on private work located outside the geographic area of their federal project. It is the responsibility of the contractor to ascertain what the OFCCP utilization goal is for the area where the private work is being performed.

Therefore, a contractor, who has one federal contract, must comply with all of the federal affirmative action requirements on all work, no matter where it is or whether or not federal monies are involved.

ABC believes that to mandate goals and timetables on private (non-federally funded) construction merely because a contractor has one federal contract is a blatant misuse, and perhaps a legally insufficient extension, of regulatory authority. Neither current statutory nor Executive Order authority grants OFCCP jurisdiction to review private (non-federal) work in areas where a federally funded contract does not exist. Further, OFCCP has never cited specific authority to support extending E.O. 11246 requirements to a covered contractor's non-federal projects in geographical locations where the contractor has no federal project. This rule expands OFCCP into areas where its authority is questionable.

In addition, the economic considerations and administrative burdens of this rule create a non-competitive position for the federal contractor in the private sector. The cost liabilities preclude the federal contractor from competing on an equal basis with non-covered contractors. It certainly cannot be the intent of OFCCP to be a weighted variable among competing companies in the private sector.

Therefore, OFCCP has created a situation where federal contractors are being forced from the private sector, while other contractors are refusing to bid on federal work. This will result in two classes of construction contractors: one which does solely federal work; the other which performs only private sector work.

Based on the March 1981 membership survey, ABC estimates that the extension of OFCCP requirements to all private work of a federal contractor increases his administrative costs by approximately 25 percent. This added cost is directly passed on to the federal government at the expense of the taxpayers.

In light of OFCCP's questionable legal authority and the additional costs associated with this extension to private projects, ABC recommends that OFCCP amend its regulations to include only those projects in the covered area.

Reports and Other Required Information (Section 60-1.7)

Currently, section 60-1.7 (a) requires a contractor with 50 employees and a contract of $50,000 to file the Standard Form 100 (EEO-1 report). OFCCP proposes to raise the threshold for filing form EEO-1 to cover contractors having 100 or more employees and a contract of $50,000. Further, the proposal does not provide for the aggregation of contracts to reach the $50,000 level.

These provisions indicate a desire to take a positive step toward reducing the administrative costs of small contractors. However, ABC suggests that OFCCP conform the threshold for the filing of the EEO-1 form for the construction industry to the thresholds for other affirmative action requirements (See discussion *supra*).

Section 60-1.7 (b) currently requires contractors and subcontractors to make certain certifications in their bids with regard to certain aspects of affirmative action compliance. Many prime contractors have been obtaining the same certifications for their subcontractors. This requirement has resulted in a major paperwork burden for the submitting subcontractors and the receiving prime contractors. ABC welcomes the proposed elimination of the subcontractor certification requirement.

Segregated Facilities (Section 60-1.8)

Section 60-1.8 (b) currently requires a certification that a contractor's facilities are not segregated. The proposal deletes the certification requirement, but continues to require contractors to maintain non-segregated facilities. ABC supports the elimination of this reporting requirement as it is unnecessary and superfluous.

Pregnancy, Childbirth and Related Medical Conditions (Section 60-1.24)

The proposed regulations do not adopt the language contained in 29 C.F.R. 1604.10 (c) which requires employers to provide disability leave for pregnant employees even if they do not provide leave for other disabilities. ABC agrees that this language is not necessary because section 60-1.24 adopts other guidelines relating to pregnancy-related medical conditions. Section 60-1.24 requires women affected by such conditions to be treated, for fringe benefit purposes, the same as other persons not so affected, "but similar in their ability or inability to work."

Sexual Harassment (Section 60-1.25)

Section 60-1.25 imposes strict liability on an employer for sexual harassment by its officials, managers and supervisors, regardless of whether the acts were authorized or forbidden, and regardless of whether the employer knew or should have known of the harassment. Where harassment occurs between fellow employees, and an employer knew or should have known of that conduct, and fails to take immediate and appropriate action, the contractor is liable for sexual harassment.

ABC believes that extending a contractor's liability to an act about which he "should have known" is unreasonable and impractical. Liability should be limited to acts only about which the contractor actually knew.

The proposed rule does not adopt the concept of holding an employer liable for the acts of its customers and clients. ABC feels that for DOL to adopt a provision which makes contractors liable for acts of sexual harassment by non-employees would extend employers liability into an area over which he certainly has no control.

Access to Records (Section 60-1.43)

Section 60-1.43 currently requires a contractor to permit OFCCP access to his records for inspection and copying. The discussion of Item 23 states that computer tapes and printouts were specifically excluded from the listing of specific types of data to which contractors must permit access in the investigation or compliance review. However, Item 23 maintains that it is not intended that OFCCP be precluded from obtaining computer tapes and printouts "in appropriate circumstances." No where is an "appropriate circumstance" defined or explained and, more importantly, the proposed regulation does not state that computer tapes and printouts are not to be included. This will lead to confusion and uncertainty at the time of an investigation or compliance review.

Further, OFCCP proposes to amend the language of the existing regulation which provides that information obtained under this section will be used only in connection with the Executive Order and the Civil Rights Act of 1964. This language is being deleted because the OFCCP is apparently fearful of violating the Freedom of Information Act. Although OFCCP assures that it is sensitive to contractor concerns regarding the possible confidentiality of data gathered in compliance reviews, ABC is skeptical that the steps taken to ensure that confidential data is not routinely released are sufficient to protect such confidentiality.

Conciliation Agreements (Section 60-1.65)

OFCCP automatically demands that contractors who have failed to meet their minority/female utilization goals must sign a conciliation agreement. Contractors have been given no opportunity to negotiate the terms of the agreement. There is no term defining the bounds of the conciliation agreement. There is no expiration date in the conciliation agreement. Should the contractor be found in noncompliance with the conciliation agreement, he is subject to immediate enforcement action.

ABC urges OFCCP to work with contractors to improve their affirmative action performance when they are found to be in deficiency. We suggest that rather than requiring the immediate signing of a conciliation agreement that OFCCP grant a contractor a 30-day grace period to correct deficiencies in his affirmative action program. No compliance action should be initiated unless a contractor has failed to act during the grace period. In addition, since during the life of the federal contract, OFCCP retains the right to monitor a contractor's compliance with its affirmative action obligations, the duration of a conciliation agreement should similarly be limited to, at a maximum, the life of the federal contract.

Back Pay (Section 60-1.71)

OFCCP proposes to not seek back pay for a period longer than two years prior to the date on which OFCCP or its predecessor compliance agencies notified the contractor of a potential compliance problem involving back pay.

ABC notes once again that efforts by the agency to obtain back pay or other retrospective remedies (e.g., "make-up" hours for underutilized minorities and women) are not supported by either E.O. 11246 or its underlying statutory authority. Such efforts also conflict directly with the decision of Congress in Title VII of the Civil Rights Act of 1964 to reserve to the federal courts the power to impose remedies for individuals.

Back pay is per se retroactive. It bears no reasonable relationship to the covenant to take affirmative action in the future. It does not contribute to the prospective increase in available labor comtemplated by the Executive Order's non-discrimination requirement. Thus, back pay remedies are not related to the purpose of the affirmative action obligation.

ABC recognizes that the agency must have a mechanism to promote compliance with the program. Such specific sanctions for noncompliance are enumerated in Section 209 of the Executive Order. In addition, contractors should be made aware that specific allegations or evidence of discrimination will be referred to the Equal Employment Opportunity Commission.

Written Affirmative Action Plans for Non-Construction Employees of Construction Contractors

ABC supports the withdrawal of the provision which would have mandated that construction contractors with 50 or more non-craft personnel and federal contracts totalling $50,000 to adopt and implement a written, detailed affirmative action program for the contractor's non-craft personnel. The provision would have required a contractor to develop detailed written plans at each construction project.

Contractors would have been required to adopt two separate affirmative action programs, for on-site and off-site employees in accordance with two different portions of the OFCCP regulations. Construction contractors already have substantial affirmative action and paperwork requirements under Part 60-4. The addition of the provision would have created a harsh and unfair burden on the construction industry. Therefore, ABC strongly supports the decision to exclude this provision from the proposal.

Summary

ABC believes that the government's affirmative action program has failed to meet its objectives. Further, the commitment to ease federal regulatory burdens on private industry and reduce the cost of the federal government has not been met by OFCCP to the fullest possible extent as evidenced by the regulations proposed on August 25, 1981. Although ABC commends the Reagan Administration for taking an important step toward regulatory reform, ABC believes that the proposed regulations will not cure the current problems and unnecessary costs associated with OFCCP's affirmative action program.

Rather than increasing the numbers of minorities and women in the construction industry, OFCCP has created a mindboggling maze of paperwork and procedures through which a contractor must find his way. A simple pruning of the maze will not simplify the quest of the construction contractor. In order to effectively free the contractor from unnecessary regulatory burdens, OFCCP must strike at the root of the problem. Therefore, ABC recommends that Congress and the Reagan Administration develop and implement an affirmative action strategy encompassing recruitment, training and hiring of minorities and women. Such a strategy will create significant opportunities for women and minorities in the construction industry and fulfill the mandate of Executive Order 11246.

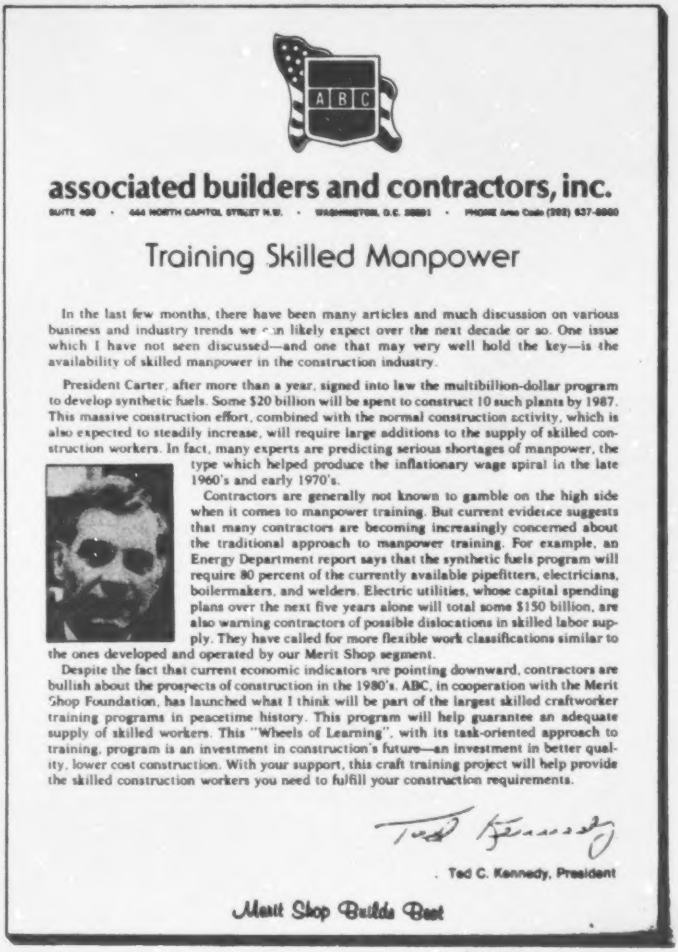
ABC urges Congress and OFCCP to fully consider ABC's recommendations and comments and meet the pressing need for sufficient reform in the area of affirmative action.

We've found a way
to control the
rising cost of
construction.

Now we need
your support to
make it work.

Working together
toward a better
future.

Wheels
of Learning!



associated builders and contractors, inc.

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Training Skilled Manpower

In the last few months, there have been many articles and much discussion on various business and industry trends we can likely expect over the next decade or so. One issue which I have not seen discussed—and one that may very well hold the key—is the availability of skilled manpower in the construction industry.

President Carter, after more than a year, signed into law the multibillion-dollar program to develop synthetic fuels. Some $20 billion will be spent to construct 10 such plants by 1987. This massive construction effort, combined with the normal construction activity, which is also expected to steadily increase, will require large additions to the supply of skilled construction workers. In fact, many experts are predicting serious shortages of manpower, the type which helped produce the inflationary wage spiral in the late 1960's and early 1970's.

Contractors are generally not known to gamble on the high side when it comes to manpower training. But current evidence suggests that many contractors are becoming increasingly concerned about the traditional approach to manpower training. For example, an Energy Department report says that the synthetic fuels program will require 80 percent of the currently available pipefitters, electricians, boilermakers, and welders. Electric utilities, whose capital spending plans over the next five years alone will total some $150 billion, are also warning contractors of possible dislocations in skilled labor supply. They have called for more flexible work classifications similar to the ones developed and operated by our Merit Shop segment.

Despite the fact that current economic indicators are pointing downward, contractors are bullish about the prospects of construction in the 1980's. ABC, in cooperation with the Merit Shop Foundation, has launched what I think will be part of the largest skilled craftworker training programs in peacetime history. This program will help guarantee an adequate supply of skilled workers. This "Wheels of Learning", with its task-oriented approach to training, program is an investment in construction's future—an investment in better quality, lower cost construction. With your support, this craft training project will help provide the skilled construction workers you need to fulfill your construction requirements.

Ted Kennedy

Ted C. Kennedy, President

Merit Shop Builds Best

Reprinted from
Merit Shop [illegible]

What Are the Construction Industry's Manpower Needs Going to Be by 1990?

While many industries face fairly gloomy prospects for the 80's, construction is looking towards one of the busiest eras in its history.

At the root of this push is energy-related construction. With the Synthetic Fuels program gearing up, experts anticipate that the growth period could begin as early as 1982. Current forecasts indicate that the synfuels program alone will create a need for up to 85,000 new construction jobs.

Other areas targeted for growth:
- housing
- light industrial and retail construction
- and business parks

Due to its favorable climate, location, and the predominance of open shop contractors, all forecasts show the Sunbelt as the center of activity for the rest of this century.

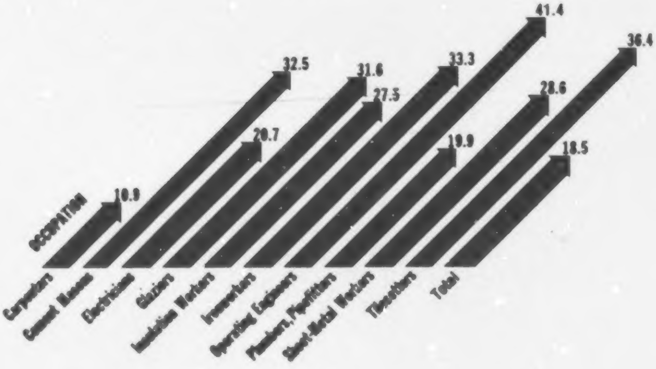
And should there indeed be a reindustrialization of America, then construction may soar out of sight. On the whole, the Bureau of Labor Statistics reports that by 1990, the demand for skilled construction workers will increase by about 20 percent or 900,000 new skilled trades people.

In addition, approximately 1.5 million construction workers will be lost through attrition making a total of 2.4 million skilled construction trades people who are needed by 1990. Current training programs produce only 50,000 skilled workers each year, or less than 25% of our needs.

A SHORTAGE OF 1,990,000 SKILLED CONSTRUCTION WORKERS MAY EXIST IN 10 YEARS. Other stumbling blocks in construction include current government regulations that require certain percentages of minorities, women, veterans, and handicapped be included in the work force. Many contractors have found themselves at a disadvantage because of their inability to hire skilled workers from these sectors. Because of these rules, contractors must step up their efforts to hire "trainable" workers.

The construction industry is required to have 6.9% of its work force to be comprised of women. Some state goals are even more demanding. Minorities must comprise 66.2% of all skilled trades in El Paso, Texas.

WHAT'S THE SOLUTION?


JOB PROSPECTS IN THE 80'S CONSTRUCTION

The Solution: Wheels of Learning

Wheels of Learning is a competency-based training program that can be used in a formal apprenticeship program leading to journeyperson status in a trade or it can be used to develop a multiskilled craftsperson to suit either a contractor's particular needs or a worker's preference.

Each construction trade is broken down into separate learning modules, every one representing a single skill. A module can be used to learn one specific task or it can be used in conjunction with other modules to create a broad skill training program customized to meet current needs.

The educational training program, available to the entire industry as well as ABC members, is designed to provide the basic training skills to entry level workers, while simultaneously upgrading the skills of currently employed crafts people in 21 fundamental construction trades.

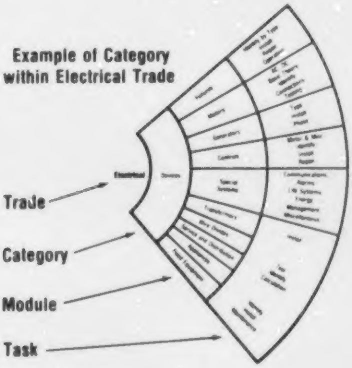
- carpentry
- cement masonry
- ceramic tile/terrazzo work
- electrical
- field engineering
- glazing
- heating, ventilating and air conditioning
- instrumentation
- insulating
- ironworking
- lathing/plastering
- masonry
- millwrighting
- operating engineering
- painting
- pipefitting
- plumbing
- roofing
- sheet metal work
- sprinkler fitting
- welding

A major advantage of the program is that it permits an individual to pursue skills in a number of trades. This can be particularly helpful to general contractors who require a crew with diversified capabilities. Experienced workers are given the opportunity to use modules to update their knowledge of seldom used skills or to learn income-producing skills in a completely new field.

The advantages this program offer a contractor are obvious. The educational benefits obtained improve the quality and number of skills a worker possesses. With more highly trained employees, the contractor's operation becomes more efficient and allows higher-quality projects to be completed in less time with a better usage of materials and manpower. From the time the first module is mastered, the employee is on the job and contributing to overall productivity.

The most important result however is that the Wheels of Learning program will provide the construction industry with the steady supply of skilled workers in all trades that will be so desperately required in the very near future.

Example of Category within Electrical Trade



Using the Program:

Wheels of Learning is designed to maximize learning by combining profusely illustrated instructional materials for the student with structured classroom activities conducted by experienced trade teachers. These class activities provide reinforcement of basic ideas, hands-on experiences, and interpretation of local practice. To increase the flexibility which a sponsor has in using the materials, each trade program is divided into a series of instructional units (modules). Each module presents one or more tasks basic to the trade.

INSTRUCTIONAL MATERIALS—Samples are shown on pages 6-8.

Each module is divided into three parts.

The first is the Student Manual, the material needed by the student to learn the task, which typically:

- Introduces the subject
- Defines new terms
- Illustrates tools and materials of the trade
- Explains how to perform tasks with illustrations
- Provides written student exercises

The second part is the Instructor's Guide, or the lesson plan. The Instructor's Guide is organized into 2½ hour class sessions. Each session of the Instructor's Guide provides an outline of what should be accomplished during the session. The content of each session includes:

- Objectives
- Introduction
- Suggested learning activities
- Time schedule for the class
- List of materials and tools needed for the session
- Supplemental reference materials
- Answers to student exercises

The last part is the test which may be in written format and/or performance oriented. The test provides:

- Written examinations for the student and answers for the instructor
- Performance testing activities to measure accomplishments of a task by the student

Curriculum Options—Samples are shown on page 9.

The sponsor of the program can utilize all the modules in any one trade to construct a total training program in that trade (such as for a four year apprenticeship training program in carpentry). If a multi-skilled training program is desired modules from various trades would be combined. (Example: combining carpentry, ironworker and sheet metal installer creates a metal building erector). Finally, if one task in a specific trade needs to be taught, that particular module covering the subject would be acquired. This final option may require that a limited number (not more than four) prerequisite modules be completed before students undertake the final module.

SAMPLE PAGE FROM STUDENT TEXT

Operating Engineer Curriculum

condition and cleanliness

12. Instrument panel for broken gauges

13. Lights for defective bulbs and broken wires

14. Differentials for leaks

Figure 4 presents a graphic procedure for the "walk-around" visual inspection procedure.

CONTROLS AND GAUGES

Prior to machine start-up and operation, the operator should become thoroughly familiar with the controls and gauges. Many loaders are alike as far as control and function may be concerned, but manufacturer's equipment may vary slightly from model to model. There may also be unique variations between front end loading machines produced by various manufacturers and these differences must be carefully noted by the operator.

Typical loader controls (Fig. 5) and their corresponding functions are as follows:

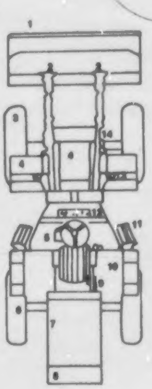
1. Parking brake: applies the driveline mounted brake.

2. Service brake: applies the service brakes. Fully depressing the brake treadle applies the brake and actuates a transmission declutch valve that disengages the transmission and provides full engine powers for bucket operation.

3. Transmission control level: controls the transmission range selector valve.

4. Transmission forward reverse lever: controls forward reverse direction of the machine.

5. Starter key: operates the

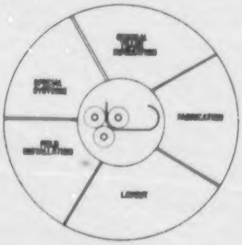


1. Bucket
2. Bucket Control Linkage
3. Final Drives (Tires)
4. Covers and Guards
5. Operator's Compartment
6. Tires
7. Engine Compartment
8. Cooling System
9. Transmission
10. Hydraulic System
11. Steps and Grab Irons
12. Instrument Panel
13. Lights
14. Differentials

Fig. 4. Visual inspection

SAMPLE PAGE FROM INSTRUCTOR'S GUIDE

Sheet Metal Work



Instructor's Guide for

TASK MODULE 201

SHEET METAL PROCESSES

Session 1

Objectives

Module: As a result of studying this part of the module, the trainee should be able to:

1. Describe the purpose and procedures for laying out and transfering sheet metal patterns.
2. Identify the tools for layout and marking.
3. Explain the procedures and identify the hand tools for making:
    a. Straight cuts
    b. Circles and curves
    c. Outside and inside cuts
4. Explain the procedures and identify the hand tools for notching.

Class: As a result of participating in this class, the trainee should be able to:

1. Demonstrate correctly the selection and use of layout and masking tools.
2. Demonstrate correctly the selection and use of hand snips for making:
    a. Straight cuts
    b. Circles and curves
    c. Outside curved cuts
    d. Inside curved cuts
    e. Notches
3. Demonstrate the use of the hacksaw.
4. Demonstrate the correct selection and use of the cold chisel.

Note To The Instructor

Approximately fifteen hours of instruction should be devoted to the study and practice of sheet metal processes in the first year of training. This portion of the Instructor's Guide is for the first of six two and one-half (2½) hour (150 minutes) class sessions.

Time Schedule (150 minutes)

10 Overview
15 Discussion/Demonstration--"The Selections and Use of Layout and Marking Tools"
25 Practice--"Transfer of Sheet Metal Patterns"
20 Demonstration/Practice--"Metal Cutting with Hand Tools"

SAMPLE TEST FROM STUDENT TEXT

Plumbing Curriculum

FINAL TEST

Task Module 202

SOLDERING AND BRAZING COPPER PIPE AND FITTINGS

NAME: ______________________ **DATE:** __________

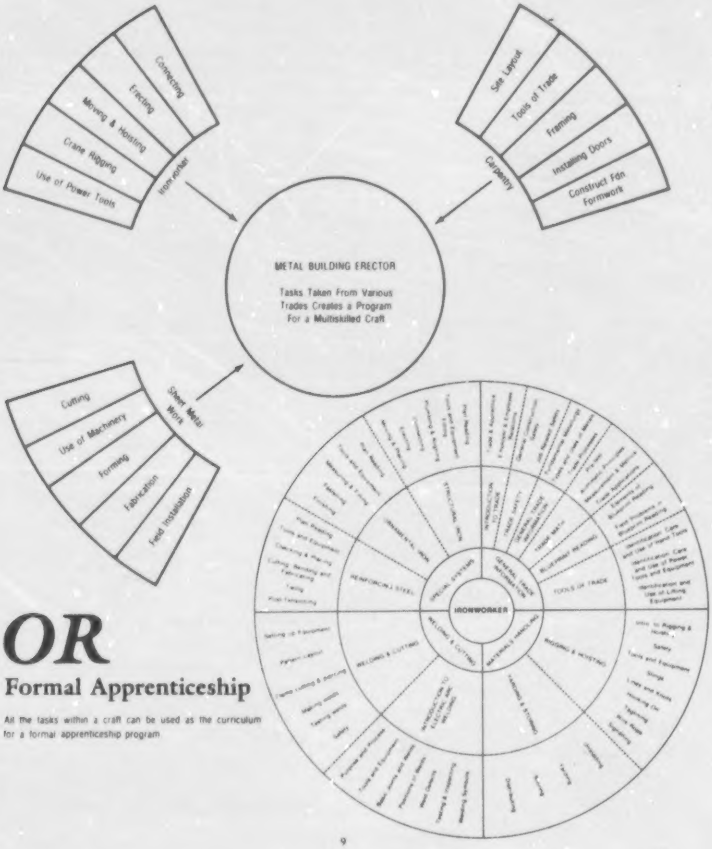
MULTIPLE CHOICE

Choose the word or phrase that *best* completes each of the following statements. Indicate your choice by printing the letter preceding it in the blank to the left of the number.

1. Soldered joints are used when connecting:
   - a. refrigeration lines
   - b. domestic water lines
   - c. steam/hot water heating lines
   - d. joints where temperatures exceed 800 degrees Fahrenheit
2. Brazed joints are required when copper is used for:
   - a. fuel lines
   - b. hot water heating
   - c. chemical lines
   - d. both a and c
3. The most commonly used solder is made of:
   - a. 95% tin, 5% silver
   - b. 50% tin, 50% lead
   - c. 60% tin, 40% lead
   - d. none of the above
4. Flux should be applied immediately after:
   - a. reaming
   - b. cleaning
   - c. soldering
   - d. taking a joint apart to re-solder
5. Pipe and fittings should *not* be cleaned with the use of:
   - a. emery cloth
   - b. flux
   - c. #00 steel wool
   - d. a wire brush
6. Solder flows into a joint by capillary action if the direction of the joint is:
   - a. downward
   - b. upward
   - c. sideways
   - d. all of the above
7. In correct sequence, the proper procedures for soldering are:
   - a. reaming, cleaning, assembling, fluxing, and soldering
   - b. cleaning, reaming, fluxing, assembling, and soldering
   - c. fluxing, assembling, soldering, and cleaning
   - d. soldering, cleaning, assembling, and cooling

Curriculum Options

Creating a Multiskilled Craftworker

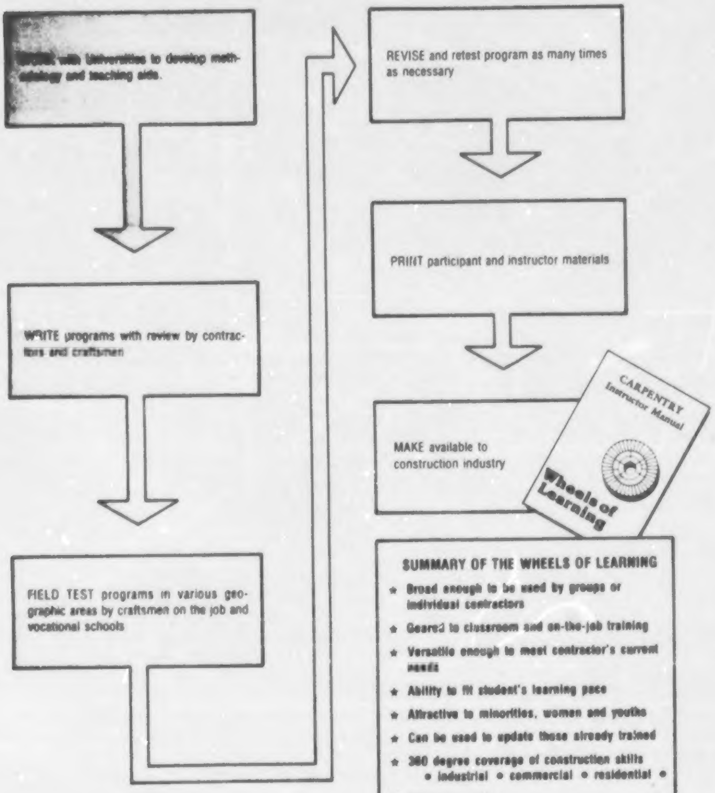


OR

Formal Apprenticeship

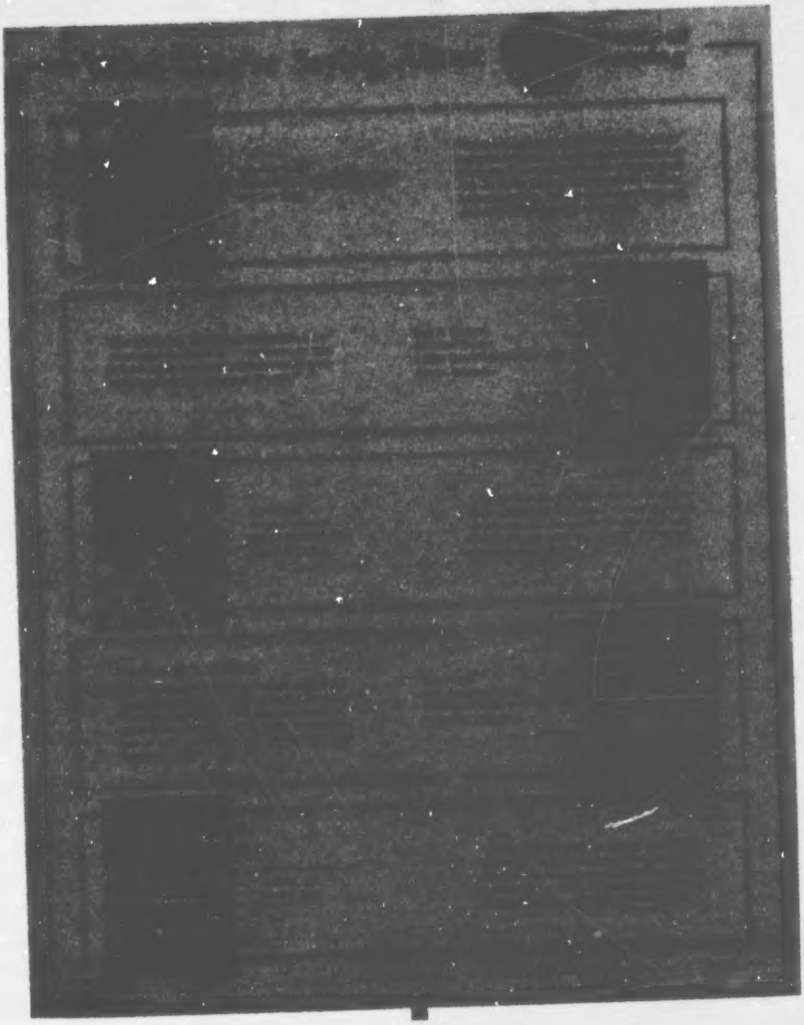
All the tasks within a craft can be used as the curriculum for a formal apprenticeship program

HOW WHEELS OF LEARNING
Programs are Developed and Used


WORK with Universities to develop methodology and teaching aids.
WRITE programs with review by contractors and craftsmen
FIELD TEST programs in various geographic areas by craftsmen on the job and vocational schools
REVISE and retest program as many times as necessary
PRINT participant and instructor materials
MAKE available to construction industry
CARPENTRY
Instructor Manual
Wheels of Learning

SUMMARY OF THE WHEELS OF LEARNING

- ★ Broad enough to be used by groups or individual contractors
- ★ Geared to classroom and on-the-job training
- ★ Versatile enough to meet contractor's current needs
- ★ Ability to fit student's learning pace
- ★ Attractive to minorities, women and youths
- ★ Can be used to update those already trained
- ★ 360 degree coverage of construction skills
  • industrial • commercial • residential •
- ★ Minimum costs
- ★ Can be set up anywhere
- ★ Suitable for long- and short-term project



BEST COPY AVAILABLE

A Summary:

Wheels of Learning:™ An investment in better quality, lower cost construction.

As Wheels of Learning helps workers improve the number and quality of their skills, the contractor's operation becomes more efficient. Construction projects are completed with greater quality in less time with less waste of man-hours and materials. Start up and completion dates can be pinpointed more accurately and, from a labor standpoint, cost overruns are kept to a minimum.

Wheels of Learning will offer complete skills development in 21 separate trades:

- carpentry
- cement masonry
- ceramic tile/terrazzo work
- electrical
- field engineering
- glazing
- heating, ventilating and air conditioning
- instrumentation
- insulating
- ironworking
- lathing/plastering
- masonry
- millwrighting
- operating engineering
- painting
- pipefitting
- plumbing
- roofing
- sheet metal work
- sprinkler fitting
- welding

The single greatest advantage of Wheels of Learning is a long-term one: **a steady supply of skilled workers in all trades**, a supply that developers, contractors and clients can bank on for a future of better quality construction at a lower cost.

Dear Ted:

I know the Wheels of Learning program will solve our industry's future manpower needs.

Enclosed is my tax deductible contribution to support development costs.

____Other ____$1,000 ____$750 ____$500 ____$300 ____$100

Make checks payable to MERIT SHOP FOUNDATION

Name ______________________________

Company ______________________________

Address ______________________________

City State Zip

Your contribution to the Merit Shop Foundation, Ltd., a 501(c)(3) educational foundation, is tax deductible.

MERIT SHOP FOUNDATION
Suite 409 / 444 N. Capitol St., N.W. / Washington, D.C. 20001 / (202) 637-8852

8/81

PREPARED STATEMENT OF FEDERALLY EMPLOYED WOMEN (FEW)

FEDERALLY EMPLOYED WOMEN (FEW) is a national membership organization representing women in the Federal government throughout the United States and in four foreign countries. FEW is a private, non-partisan organization which has supported women in five administrations since its founding in 1968. Our primary goals are to advocate equal opportunity and foster full potential for working women in the Federal service. In these efforts, we share a common bond with the Federal Women's Program, an internal government program created in reponse to E.O. 11375 which,added sex to the other forms of discrimination prohibited by the Federal government.

FEW has worked on many fronts to end sex discrimination in the civil service - in recruitment, hiring, training, promotion, job classification, wages and benefits - to name but a few. Systemic discrimination has been the overriding obstacle in all of these efforts and FEW strongly supports affirmative action as a remedy for redress. Our concern about the fate of affirmative action is only intensified in light of the current personnel cutbacks and budgetary restraints affecting employment policies.

Naturally, we are greatly concerned about recent attempts to malign affirmative action as "burdensome, ineffective, counterproductive and no longer necessary." We, therefore, appreciate the opportunity to submit our statement to the House Employment Opportunities Subcommittee for the record.

To begin, it is helpful to shed some historical perspective on the legal underpinnings of affirmative action and to better clarify what affirmative action is and what it is not. While it's true that the struggle for full equality was catapulted by the passage of the Civil Rights Act of 1964, this government has been trying to deal with discrimination in employment since the late 1700's. Many of the laws passed by the Federal legislature barring discrimination by the States (Civil Rights Acts of 1866, 1870, and 1871), however, allowed the Federal government itself to escape similar restraints and liabilities. The Civil Rights Act of 1883 was the first real attempt to legislate a merit system for employment in the Federal government, traditionally dominated by the political spoils system.

However, throughout the last century, equal opportunity laws and statutes governing Federal hiring ploicy only stated passively what agencies could not do and not what they should be compelled to do. Such policy was exemplified by E.O. 8587, issued by President Roosevelt in 1940, which was the first of a series of executive orders which stated that public employment could not be denied for reason of race, creed or color.

The major development in the past 15 years has been the shift from passive to "affirmative" methodologies in governing employment practices. The Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 were the bellwether statutes in providing protection and enforcement for victims of discrimination. The Civil Rights Act which barred discrimination in all practices because of race, sex, color, religion or national origin, also created the Equal Employment Opportunity Commission (EEOC) to administer and enforce this statute. E.O. 11246, also a product of the Johnson administration, set EEO standards for any contractor who did business with the Federal government. Thus, for the first time, EEO was placed in the mainstream of

Federal personnel administration. Sex equity was given the same status as other forms of discrimination in the Federal service with the passage of another Johnson executive order, E.O. 11375. This statute, passed in 1967, not only fostered the Federal Women's Program, but was the impetus behind the founding of Federally Employed Women as a private organization to insure implementation of EEO goals.

E.O. 11478, issued by President Nixon in 1969, finally put teeth into enforcement efforts by totally integrating all parts of personnel management with equal opportunity - hiring, training, promotions, etc. - and clearly spelled out affirmative action methods for accomplishing this. On the heels of these developments, in 1971, the Supreme Court in Griggs v. Duke Power Co., established the key principles which would govern EEO. No longer was discriminatory intent required to prove Title VII violation; only adverse impact was required. The emphasis then, switched from merely removing discriminatory barriers to providing results oriented remedies to correct underrepresentation.

This principle was belatedly applied to government agencies themselves with the passage of the Equal Employment Opportunity Act of 1972 (P.L. 92-261) which gave public sector employees Title VII protection. The Federal government's Civil Service Commission now was mandated to take action to achieve measurable gains in employing women and minorities within the merit system. In 1978, E.O. 12067, issued by President Carter in his government reorganization plan, transferred nearly all functions for EEO and affirmative action to the EEOC. Also in 1978, the Garcia amendment to the Civil Service Reform Act (5USC 7201) required agencies to develop a Federal Equal Opportunity Recruitment Program (FEORP). The uniform guidelines on employee selection procedures which spell out affirmative action plans became effective that same year.

Thus, as it became clear that systemic discrimination resists change unless personnel policies are mandated which can be enforced and documented, the legal base for affirmative action evolved. Broadly speaking, affirmative action is any race or sex conscious measure beyond passive restraint of discriminatory actions, which is supposed to correct or compensate for past, present or future discrimination. While this concept in theory has enjoyed considerable support, the practical methods for its implementation have drawn the fire and fury of business, academia and previously privileged classes - namely white males. The forced use of "goals and time-tables" are the focus of much of this resentment.

Goals and timetables evolved when it became obvious that the best intentions both by public and private sector yielded little if any positive results. Agencies and private firms could grind out reams of "good paper" detailing obstacles to full utilization of women and minorities,with impressive affirmative action plans designed to rectify the situation,only to achieve negligible results in numbers. Therefore, goals and timetables were designed to put results oriented tools into the program. They reflect a flexible range of availability of women and minoities for employment, the need for training programs and the duration of such programs. Compliance is not determined by rigidly meeting the goals (as would be the case with fixed quotas), but employers do need to show that a "good faith" effort was made. Serious sanctions such as debarment have been rare. A key point to be made here is that at no time was affirmative action intended to compel employers to hire unqualified persons or to subvert the merit system. Nothing would be so blatently counterproductive than to promote otherwise unqualified individuals by virtue of their sex or race for positions in which they are destined to perform poorly. To the extent that this has happened in individual cases is an unfortunate abuse of the system and the object of much of the current critisism. Such incidents have led to charges of reverse discrimination, preferential treatment, quota systems, etc. - all of which have given affirmative action a bad name.

Also important to remember is that affirmative action is not a requirement imposed on employers in spite of past history, but simply a remedy to redress the continuing effects of past discrimination. As to when it will have served its purpose and no longer be needed, we may have a good while to go. We only have to look at the persistence of the wage gap and job segregation to see that the problems are far from solved. Statistics relevant to the Federal sector are attatched to illustrate. (See attatchment.)

Not only are goals and timetables a useful standard against which to measure progress, but a recent U.S. Court of Appeals ruling held that affirmative action without numbers risks the rights of nonminorities (Lehman v. Yellow Freight System; U.S. Court of Appeals; 7th Circuit, Chicago; No. 80-2180, 6/17/81). In this case, a White truck driver was passed over by a Black worker with fewer qualifications. The hiring official had no knowledge of numerical goals or relevant labor force statistics, yet admitted that race was a factor in the Black applicant's favor. Thus, the Court commented that without numerical goals and timetables, employers may well go overboard and continued beyond a reasonable time limit for affirmative action plans to the loss of non-minority applicants.

Furthermore, the use of numerical formulae force employers to keep a current data base of employment of women and minorities in various occupations, across grade and salary level. Such statistical analyses are not only necessary to plot progress and plan new initiatives, but provide critical information when legal action is taken.

To the question of whether or not affirmative action has helped increase employment of women and minorities, we refer to supportive statistics in the Federal government where gains for both groups (particularly in the middle grades) are evident during the years of affirmative action programs.*[2]

	WOMEN		MINORITIES	
	1970	1980	1970	1980
GS 1-8	84.6%	76%	78.8%	68.3%
GS 9-12	13.6%	21.3%	17.5%	25.5%
GS 13-15	1.3%	2.6%	3.5%	6. %
EXEC.	.02%	.08%	.06%	.2%
% of total	40.6%	45.3%	14.7%	20.8%

Also, gains for women in educational institutions have been dramatic in the nine years since the passage of Title VII, the major law against sex bias in Federally funded educational programs. The National Advisory Council on Women's Educational Programs, in a recently issued report, documented impressive growth of academic acheivement by women in professional and athletic fields.* For example, the share of professional degrees earned by women has quadrupled to 25% and women have doubled their participation in intercollegiate athletic programs to nearly one-third. However, the status of women as educators in high schools and colleges is less glowing. Women still trail men in salaries, promotions and appointments of tenure. Persuasive testimony was offered by others during Congressional hearings this year detailing gains by women through affirmative action in banking, the skilled trades and corporate management.

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* Washington Post, October 18, 1981, "Women Students Make Big Gains in U.S. Schools," by Kathy Sawyer.

*[2] Statistics from OPM publication on Minority Group Employment in Federal Government (1970 and 1980).

With regard to the gains cited by women, we do not mean to imply that there is a direct cause and effect relationship. Clearly, there have been corresponding changes in women's education, job choices, social roles and economic necessity which account for some of the gains. But affirmative action has provided a strong catalyst for the employer to accomodate these changes. We are also not claiming that affirmative action alone is the panacea. One need only look at the wage data (male v. female) and the precipitous dropoff of women in the higher grades to realize that other solutions are wanting.

Of course, the intangible benefits of affirmative action programs are equally valuable, though more difficult to measure. The conscience of the Federal government as an equal opportunity employer has definitely been raised,and it is a rare personnelist indeed who doesn't at least question a civil service register devoid of women or minorities.

Good conscience and intentions aside, any student of elementary management science knows that the larger the pool of human resources, the more able the talent that sifts to the top. Any good manager should do whatever is in his/her power to create a broad and heterogeneous management pool; it is not only fair but makes good business sense.

Current critics of affirmative action would probably agree with the above premise. However, they argue that while measures taken to increase the applicant pool are clearly justifiable, there is no such clear statutory base for results oriented enforcement - i.e. goals and timetables. The Department of Justice made it crystal clear to this committee that it intends to draw in the reins on Title VII; that it will no longer insist upon or support goals and timetables, and will offer remedial relief only to identifiable victims of proven discrimination on a case by case basis. In fact, in a startling memo to the EEOC, the Assistant Attorney General, W. Bradford Reynolds, stated that it would be premature to impose requirements for goals and timetables in affirmative action plans on agencies in light of the questionable statutory authority to do so. The DOJ rejects results oriented measures because they believe they contradict the statutory intent of sex discrimination laws and create reverse discrimination.

Such an approach largely ignores the most prominant decisions of the Supreme Court concerning affirmative action in recent years. In Regents of the University of California v. Bakke, the Court ruled that while Title VII of the Civil Rights Act doesn't require quotas for admissions to a state operated medical school, the university can give positive consideration to race and ethnicity as one of many other factors. Also, in U.S. Steelworkers v. Weber, the Supreme Court reached further still in holding that race and ethnicity quotas were permissable under Title VII if used in a manner which promoted integration of an employer's workforce.

To the question of affirmative action spoiling the merit system in the Federal government, we would argue that quite the contrary, it creates a healthy counterbalance in a system that has been governed for years by politics, the "Ol' Boy Network" and Veteran's Preferance.

It is also widely touted that affirmative action is a burdensome and expensive paperwork process. Our own experience with some of the EEOC requirements would support this charge in part, But rather than rationalize this as reason enough to trash the whole system, we would offer instead some constructive criticism. Since our expertise is in the Federal sector, we will limit our comments here to internal Federal programs.

Our suggestions fall into two major categories; first - cutting down on uniformity of procedures and paperwork, and second - switching the driving motivation from the stick to the carrot.

Currently, EEOC designs detailed and specific programs for "typical agencies" to follow. However, the problem is that there are few typical agencies and it is very difficult to tailor plans to meet standard procedures. For example, the Department of Defense, the largest employer of women in the Federal government and of women in FEW, is organized on a totally different basis than agenices like EEOC and the Office of Personnel Management (OPM). DOD is laid out functionally, not regionally with different internal organizational structure and chain of command. Therefore, it might be better if DOD could devise and be responsible for implementing its own plan tailored to its own structure. This would shift the technical burden of plan design and implementation from the EEOC and OPM to DOD and its major components who would be held accountable. However, adherence to fundamental guidelines and principles must be mandatory, i.e. the use of workforce statistics to determine representation and the use of goals and timetables. The criterion for the programs would be established at a lower level, thus making them more meaningful and practicable. This should also lessen the total cost as EEOC and OPM would be looking in general at the bottom line results.

It should be noted that any delegation and decentralization of authority for program implementation has potential pitfalls. Some agencies may abuse their authority in one way or the other - some may be lax, some overzealous in carrying our their plans. This would depend on the predisposition of the agency management toward affirmative action in general. Close controls by the EEOC on agency progress and accountability would be advisable, especially in the initial stages. The EEOC would still not be dictating the plan itself but overseeing the agency's own schedule of implementation and offering technical assistance as warranted. If the agency's performance was sastisfactory, further involvement by regulatory and personnel functionaries would focus on problem areas where technical assistance was needed or investigating reported irregularities in agency plans. Individual control by agencies would lessen resentment (similar to resentment felt by business) and would tend to reward creativity.

A further suggestion would be to better integrate the recruitment and Equal Employment Opportunity plans. The Civil Service Reform Act of 1978 mandated the Federal Equal Opportunity Recruitment Program, which is a government wide recruitment policy that operates under OPM. However, being that it is not a hiring policy, it is unclear how it relates to Equal Employment Opportunity affirmative action policy which is governed by the EEOC. Both problems utilize workforce statistics on the representation of women and minorities and both programs involve projections on how agencies can improve their own representation. However, their is no present policy guideline on how the two should intermesh or which agency (OPM or the EEOC) has the ultimate authority over the overall objective,which is to have a well integrated, representative workforce.

The second category of recommendations would be to instill more incentive into the performance of Equal Employment Opportunity initiatives: the shift from the stick to the carrot. Now, the incentive to comply with affirmative action plans is that it is required by law and agencies respond to escape reprimand. Managers are also rated on their EEO efforts in their performance appraisals but this has yet to net more than token results.

More direct and motivating incentives might be monetary awards offered by agencies or military activities to components of the organization which make recognizable gains. The awards should be applied to the program, not to individuals, to diminish the temptation for abuse. Agencies could offer additional slots or staffing, or perhaps relief from additional reporting procedures for good performance.

As with other major program changes in an organization as large as the Federal government, such an approach should be tried on a small experimental model of approximately five agencies selected for their representativeness of the whole Federal workforce. There are other suggestions that could be gleaned from operating agency officials themselves whose everyday "hands on" experience would be invaluable to any oversight committee. Since much of what is done within the Federal sector reflects on what is done in private industry and Federal contractors, such expertise is not only relevant and available, but prudent to solicit.

In sum, FEW recommends that the Federal government maintain its concentration on race and sex conscious tools to achieve a well integrated workforce and continue to use statistical measures of compliance with nondiscrimination such as goals and timetables. Overt and obvious discrimination is rare in this day and age on the Federal level but bias is found buried in obtuse selection procedures often irrelevant to job performance (in spite of the merit system). This makes enforcement on an individual level difficult and inefficient and does not counteract seemingly neutral employment practices which have adverse impact on women and minorities.

Thus, if we are to have enforcement at all, it must be results oriented. This is particularly true now with current budget restraints. We know for example that many of the recent gains for women will be threatened by the impending reduction-in-force (RIF). Women, especially those in the mid-level professional and administrative areas, will be at a competitive disadvantage because of limited seniority and lack of veteran's preference protection. Agency funding cutbacks will also curtail programs aimed at improving career potential for women - i.e. recruitment (FEORP), training, upward mobility, child care and career part-time jobs.

Recently, one of our members in the EEO field was visited by a Japanese policy analyst who wanted to know more about affirmative action in this country. After a thorough explanation of the concept and how it is applied in the Federal sector within the merit system, he was then told about the current drive to return to voluntary compliance and remove goals and timetables. He replied wryly - "Then, what's left?". Simply, but aptly stated, we wholeheartedly agree.

- Summary of Recommendations -

1. Retain E.O. 11246 as amended.

2. Retain strong enforcement of affirmative action programs within Federal agencies.

3. Retain plan for agencies and federal contractors to utilize goals and timetables in affirmative action plans.

4. Regarding E.O. 11246 - no decrease in threshold of coverage, back pay penalties or debarment sanctions.

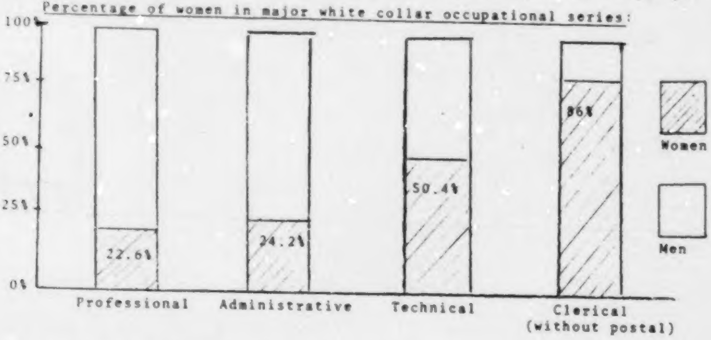
5. Changes in reporting procedures and incentives for compliance as outlined above for Federal sector.

FEW thanks this committee for its concern about the direction of affirmative action and equal employment opportunity enforcement within the new Administration. We appreciate the opportunity to submit our statement for the record and remain available for further consultation.

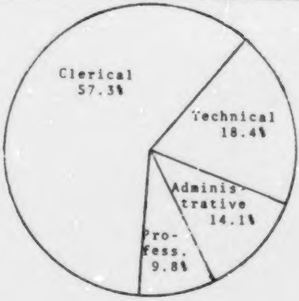
STATISTICS IN WHITE COLLAR WORKFORCE

Women are 37.6% (723,673) of the white collar workforce (1,926,136).

Percentage of women in major white collar occupational series:



How women are concentrated across white collar series



Salary comparisons between men and women in white collar series

- On the average, for every $1 women earn in the white collar series, men in the same series earn more.

Professional - men earn 45¢ more for every $1 women earn.

Administrative - men earn 29% more for every $1 women earn.

Technical - men earn 26¢ more for every $1 women earn.

Clerical - men earn 27¢ more for every $1 women earn.

Mechanical Contractors Association of America, Inc.
Suite 750, 5530 Wisconsin Ave., Washington, D.C. 20015
Telephone (202) 654-7960 TWX: 710-825-0423

October 23, 1981

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OCT 26 1981
[illegible]

Mr. Ed Cook
House Subcommittee on Employment
  Opportunities
B-346 A Rayburn House Office Bldg.
Washington, D. C. 20515

Dear Mr. Cook:

It was very useful for all of us to have an opportunity to discuss our views and strategy on OFCCP regulations at the Construction Industry EEO Coalition Session on October 13.

As promised at that time, I am enclosing a copy of this association's statement in response to proposed OFCCP rule changes published in the Federal Register on August 25.

We would appreciate it if you could submit this statement for the record in your committee hearings.

Thank you very much. We shall look forward to hearing from you about future hearings or meetings when appropriate.

Sincerely,

Thelma S. Mrazek

Thelma Stevens Mrazek
Director of Communications

TSM/jaf

cc: Frank J. Salatto

PROPOSED AMENDMENTS TO EXECUTIVE ORDER NO. 11246

EQUAL OPPORTUNITY IN FEDERAL EMPLOYMENT

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

PART I - NONDISCRIMINATION IN GOVERNMENT EMPLOYMENT

[Superseded by Ex. Ord. No. 11478, Aug. 8, 1969, 34 F.R. 12985]

[AMENDED] PART II - NONDISCRIMINATION IN EMPLOYMENT BY GOVERNMENT CONTRACTORS AND SUBCONTRACTORS AND BY LABOR UNIONS AND OTHER AGENCIES WHO REPRESENT AND/OR FURNISH EMPLOYEES ENGAGED IN WORK UNDER GOVERNMENT CONTRACTS

SUBPART A - DUTIES OF THE SECRETARY OF LABOR

Sec. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

SUBPART B - CONTRACTORS' AGREEMENTS

Sec. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance; *Provided*, *however*, That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

Sec. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar Executive Order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: Provided, That to the extent such information is within the exclusive possession of a labor union or an agency referring workers or providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the contracting agency as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

[DELETE] ~~(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, religion, sex or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the order. In the event that the union, or the agency shall refuse to execute such a statement, the Complaince Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary~~

~~of Labor may require.~~

[NEW] (d) The contracting agency or the Secretary of Labor shall require any bidder or prospective contractor or subcontractor to submit, as part of his Compliance Report, the names and addresses of: any labor unions which represent any of his employees; any labor unions or agencies which refer workers to the bidder or prospective contractor or subcontractor; or any labor union or agency that provide or supervise apprencticeship or other training, with which the bidder or the prospective contractor deals. If the bidder or prospective contractors or subcontractors do not deal with any labor union or agencies referred to above he shall certify such fact in writing to the contracting agency or the Secretary of Labor.

Sec. 204. The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: Provided, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: And provided further, That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

[NEW] SUBPART C - REQUIREMENTS OF LABOR UNIONS AND OTHER AGENCIES

Sec. 205. (a) Except with respect to contracts exempted in accordance with Section 204 of this Order, the appropriate contracting agency or the Secretary of Labor shall require of any labor union who represents for purposes of collective bargaining the employees of any contractor or subcontractor engaged in work under a Government contract, or any labor union and/or agency which refers workers to any contractor or subcontractor engaged in work under a Government contract, or any labor union or agency that supervises or provides an apprenticeship or training program with which such contractor or subcontractor deals, to furnish a sworn statement in writing, signed by an authorized officer or agent, that during performance of work under the contract such labor union or agency will not discriminate against any of its members or applicants for membership because of race, color, religion, sex or national origin; that the labor union or agency will comply with all applicable provisions of Executive Order No. 11246 of September 24, 1965, as amended, and of the rules, regulations, and relevant orders of the Secretary of Labor; that the labor union or agency will cooperate in all respects with the contractor or subcontractor with which it deals so that such contractor or subcontractor may achieve any affirmative action goals that it may have undertaken under this Order; and that the labor union or agency will take affirmative action to ensure that its policies and practices do not discriminate against any of its members or applicants for membership on the grounds of race, color, religion, sex or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; assignment of work; layoff or termination; rates of pay or other forms of compensation; training and selection for training, including apprenticeship; referral, and methods of referral.

(b) In the event of a union's or agency's refusal to furnish the signed statement prescribed in Sec. 205(a) or a failure to comply with the same, or with any of the applicable provisions of this Order or with any of the applicable rules, regulations or orders of the Secretary of Labor, the Secretary of Labor may petition the Internal Revenue Service to revoke any tax exempt status such labor union or agency might have in accordance with existing Internal Revenue Service procedures and such union or agency may be declared ineligible to furnish or refer members or applicants for employment to contractors who have any employees engaged in work under a Government contract in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, as amended, and such other sanctions may be imposed and remedies invoked as prescribed in Executive Order No. 11246 of September 24, 1965, as amended, or by rule, regulation or order of the Secretary of Labor, or as otherwise provided by law.

Sec. 206. (a) Each union or agency having filed a sworn statement containing the provisions prescribed in Section 205(a) shall file Compliance Reports with the appropriate contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs and membership statistics of the union or agency, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Unions or other agencies may be required to state whether they have had members engaged in, or whether they have referred members or workers to a contractor who has had employees engaged in, work under any previous contract subject to the provisions of this Order, as amended, and in that event said union or agency shall submit such Compliance Reports in such form as the Secretary of Labor may require.

(c) Each union or agency having filed a sworn statement containing the provisions prescribed in Section 205(a) shall permit access to its books, records and accounts by the appropriate contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with the statement, and with the applicable rules, regulations and orders of the Secretary of Labor.

SUBPART D - POWERS AND DUTIES OF THE SECRETARY OF LABOR AND THE CONTRACTING AGENCIES [formerly SUBPART C]

Sec. 207. [formerly Sec. 205] Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of the Secretary of Labor in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations, and orders of the Secretary of Labor issued pursuant to this Order. They are directed to cooperate with the Secretary of Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this Order. They are further directed to appoint or designate, from among the agency's personnel, compliance officers. It shall be the duty of such officers to seek compliance with the objectives of this Order by conference, conciliation, mediation, or persuasion.

Sec. 208. (a) [formerly Sec. 206.(a)] The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency, to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor and the investigating agency shall report to the Secretary of Labor any action taken or recommended.

(b) The Secretary of Labor may receive and investigate or cause to be investigated complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order. If this investigation is conducted for the Secretary of Labor by a contracting agency, that agency shall report to the Secretary what action has been taken or is recommended with regard to such complaints.

[NEW] Sec. 209 (a) The Secretary of Labor may investigate the recruitment, training, membership, hiring or referral policies and practices of any labor union who represents for purposes of collective bargaining any employees of a contractor engaged in work under a Government contract, or any labor union and/or agency which refers workers to a contractor who is engaged in work under a Government contract, or any labor union or agency providing or supervising apprenticeship or training programs which deals with a contractor who is engaged in work under a Government contract, or initiate such investigation by the appropriate contracting agency, to determine whether or not the provisions set forth in the statement specified in Section 205(a) of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor and the investigating agency shall report in writing to the Secretary of Labor what action has been taken or is recommended with regard to such complaints.

[NEW] (b) The Secretary of Labor may receive and investigate or cause to be investigated complaints by any person against a labor union which represents for purposes of collective bargaining employees of a contractor or subcontractor engaged in work under a Government contract, or any labor union and/or agency which refers workers to any contractor or subcontractor engaged in work under a Government contract. or any labor union and/or agency that supervises or provides an apprenticeship or training program with which such contractor or subcontractor deals, which allege discrimination by said labor union or agency which is contrary to the provisions of the statement specified in 205(a) of this Order. The Secretary of Labor may also receive and investigate or cause to be investigated complaints by any contractor or subcontractor engaged in work under a Government contract that any labor union which represents any of his employees for purposes of collective bargaining, or any labor union and/or agency which refers workers to him, or any labor union and/or agency with which he deals that provides or supervises apprenticeship or training programs, which allege discrimination by said labor union or agency which is contrary to the provisions of the statement specified in Section 205(a) of this Order. If such investigation is undertaken for the Secretary of Labor by a contracting agency, that agency shall report in writing to the Secretary what action has been taken or is recommended with regard to such complaints.

[DELETE] ~~Sec. 207. The Secretary of Labor shall use his best efforts, directly and through contracting agencies, other interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, [illegible] appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 [sections 2000d to 2000d-4 of this title and this subchapter] or other provision of Federal law.~~

Sec. 210. (a) [formerly Sec. 208(a)] The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 210(a)(6), shall be made without affording the contractor, an opportunity for a hearing.

SUBPART E - SANCTIONS AND PENALTIES [formerly SUBPART D]

Sec. 210. (a) [formerly Sec. 209(a)] In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:

(1) [formerly Sec. 209(a)(1)] Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

[AMENDED] (2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, or of the provisions of the statement set forth in Section 205(a) of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) [formerly Sec. 209(a)(3)] Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964 [this subchapter].

(4) [formerly Sec. 209(a)(4)] Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) [formerly Sec. 209(a)(5)] Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with

the nondiscrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) [formerly Sec. 209(a)(6)] Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

[NEW] (7) Where the Secretary of Labor has concluded that any labor union and/or agency that refers workers to a contractor or subcontractor under a Government contract, has failed to comply with the provisions of this Order, the requirements of the statement specified in Section 205(a), or any of the rules, regulations, and orders of the Secretary of Labor, he may require that such labor union and/or agency cease maintaining any hiring hall or other referral arrangement with any contractor or subcontractor under a Government contract, until said union and/or agency has taken such steps as the Secretary of labor or the appropriate contracting agency deems necessary to bring it into compliance.

[NEW] (8) Where the Secretary of Labor has concluded that any labor union and/or agency that refers workers to a contractor or subcontractor under a Government contract, has failed to comply with the provisions of this Order, the requirements of the statement specified in Section 205(a), or any of the rules, regulations, and orders of the Secretary of Labor, the Secretary of Labor may conclude that such failure to comply is prima facie evidence of a failure to operate in good faith on a non-discriminatory basis and may petition the Internal Revenue Service to revoke, in accordance with Internal Revenue Service procedures, any tax exempt status such labor union or agency may have.

[NEW] (b) Under rules and regulations prescribed by the Secretary of Labor, each appropriate contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the nondiscrimination provisions and requirements of the statement specified in Section 205(a) of this Order by methods of conference, conciliation, mediation and persuasion before proceedings shall be instituted under Subsection (a)(2) of this Section, or before action is taken under Subsections (a)(7) or (a)(8) of this Section for failure of a labor union or agency to comply with the applicable provisions of this Order.

Sec. 211. [formerly Sec. 210] Any contracting agency taking any action authorized by this Subpart, whether on its own motion, or as directed by the Secretary of Labor, or under the rules and regulations of the Secretary, shall promptly notify the Secretary of such action. Whenever the Secretary of Labor makes a determination under this Section, he shall promptly notify the appropriate contracting agency of the action recommended. The agency shall take such action and shall report the results thereof to the Secretary of Labor within such time as the Secretary shall specify.

Sec. 212. [formerly Sec. 211] If the Secretary shall so direct contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor or, if tne Secretary so authorizes, to the contracting agency.

Sec. 213. [formerly Sec. 212] Whenever a contracting agency cancels or terminates a contract, or whenever a contractor has been debarred from further Government contracts, under Section 210(a)(6) because of noncompliance with the contract provisions with regard to nondiscrimination, the Secretary of Labor, or the contracting agency involved, shall promptly notify the Comptroller

General of the United States. Any such debarment may be rescinded by the Secretary of Labor or by the contracting agency which imposed the sanction.

SUBPART F - CERTIFICATES OF MERIT [formerly SUBPART E]

Sec. 215. [formerly Sec. 213] The Secretary of Labor may provide for issuance of a United States Government Certificate of Merit to employers or labor unions, or other agencies which are or may hereafter be engaged in work under Government contracts, if the Secretary is satisfied that the personnel and employment practices of the employer, or that the personnel training, apprenticeship, membership grievance and representation, upgrading and other practices and policies of the labor union or other agency conform to the purposes and provisions of this Order.

Sec. 216. [formerly Sec. 214] Any Certificate of Merit may at any time be suspended or revoked by the Secretary of Labor if the holder thereof, in the judgment of the Secretary, has failed to comply with the provisions of this Order.

Sec. 217. [formerly Sec. 215] The Secretary of Labor may provide for the exemption of any employer, labor union, or other agency from any reporting requirements imposed under or pursuant to this Order if such employer, labor union, or other agency has been awarded a Certificate of Merit which has not been suspended or revoked.

PART III - NONDISCRIMINATION PROVISIONS IN FEDERALLY ASSISTED CONSTRUCTION CONTRACTS

Sec. 301. Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 202 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the administering department or agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations, and relevant orders of the Secretary, (2) [NEW] to assist and cooperate actively with the administering department or agency and the Secretary of Labor in obtaining the compliance of labor unions or other agencies engaged in work under such contracts with the applicable provisions of this Order and with the rules, regulations, and relevant orders of the Secretary, (3) [formerly Sec. 301(2)] to obtain and to furnish to the administering department or agency and to the Secretary of Labor such information as they may require for the supervision of such compliance, (4) [formerly Sec. 301(3)] to carry out sanctions and penalties for violation of such obligations imposed upon contractors, subcontractors, labor unions and agencies by the Secretary of Labor or the administering department or agency pursuant to Part II, Subpart E, of this Order, and (5) [formerly Sec. 301(4)] to refrain from entering into any contract subject to this Order, or extension or other modificatin of such a contract with a contractor debarred from Government contracts under Part II, Subpart E, of this Order.

Sec. 302. (a) "Construction contract" as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) The provisions of Part II of this Order shall apply to such construction contracts, and all work engaged in thereunder, and for purposes of such application the administering department or agency shall be considered the contracting agency referred to therein.

(c) The term "applicant" as used in this Order means an applicant for Federal assistance or, as determined by agency regulation, other program participant, with respect to whom an application for any grant, contract, loan, insurance, or guarantee is not finally acted upon prior to the effective date of this Part, and it includes such an applicant after he becomes a recipient of such Federal assistance.

Sec. 303. (a) Each administering department and agency shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor, and to furnish the Secretary such information and assistance as he may require in the performance of his functions under this Order.

(b) In the event an applicant fails and refuses to comply with his undertakings, the administering department or agency may take any or all of the following actions: (1) cancel, terminate, or suspend in whole or in part the agreement, contract, or other arrangement with such applicant with respect to which the failure and refusal occurred; (2) refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from such applicant; and (3) refer the case to the Department of Justice for appropriate legal proceedings.

(c) Any action with respect to an applicant pursuant to Subsection (b) shall be taken in conformity with Section 602 of the Civil Rights Act of 1964 [section 2000d-1(b) of this title] (and the regulations of the administering department or agency issued thereunder), to the extent applicable. In no case shall action be taken with respect to an applicant pursuant to Clause (1) or (2) of Subsection (b) without notice and opportunity for hearing before the administering department or agency.

Sec. 304. Any executive department or agency which imposes by rule, regulation, or order requirements of nondiscrimination in employment, other than requirements imposed pursuant to this Order, may delegate to the Secretary of Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration of requirements imposed under this Order: Provided, That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 [sections 2000d to 2000d-4 of this title] shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof [section 2000d-1 of this title] and the regulations of the administering department or agency issued thereunder.

PART IV - MISCELLANEOUS

[Text Omitted]

Mechanical Contractors Association of America, Inc.
Suite 750, 5530 Wisconsin Ave., Washington, D.C. 20015
Telephone (202) 654-7960 TWX 710-825-0423

September 22, 1981

Mr. Edmund D. Cooke, Jr., Counsel
Subcommittee on Employment Opportunities
Room B346A Rayburn House Office Building
U. S. House of Representatives
Washington, D. C.

Dear Mr. Cooke:

Alva Hall, Gus Dowels and I very much appreciate your meeting with us to discuss the needed changes in Office of Federal Contract Compliance Programs regulations affecting the construction industry. We sincerely hope that solutions can be found centering around more emphasis on recruitment and training and less on "policing" and confrontation.

The problems caused to the construction industry are outlined in the attached testimony given recently before the Senate Labor and Human Resources Committee.

Although Gus Dowels may send you a second copy, I am enclosing the "Proposed Amendments to Executive Order No. 11246," which were initiated by the Metropolitan Detroit Plumbing and Mechanical Contractors Association.

For your information a brochure,"MCAA Serving the Industry," which describes this industry and the association, is also enclosed.

As we pointed out to you, we feel that a major revision of the regulations and perhaps the Executive Order is needed so that the laws and regulations fit the industry, flexibility is provided employers in the various aspects of construction, the economic impact is adjusted between the nonunion and union employing segments, the work of voluntary associations and Hometown plans are given equal policy roles with the rigid 16 or 9 step requirements and the paperwork burden is reduced.

We will look forward to discussing our ideas further with you as they develop.

Sincerely,

Thelma Stevens Mrazek

Thelma Stevens Mrazek
Director of Communications

TSM/jaf

cc: Frank J. Salatto
Jerry C. Pritchett

Enclosure

Mechanical Contractors Association of America, Inc.
Suite 750, 5530 Wisconsin Ave., Washington, D.C. 20015
Telephone (202) 654-7960 TWX: 710-825-0423

STATEMENT BY THE MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA, INC. AT OVERSIGHT HEARINGS ON OFCCP BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE

JULY 29, 1981

Mr. Chairman and Members of the Committee:

We are here today representing firms belonging to the Mechanical Contractors Association of America, Inc. These firms build systems that move fluids, both liquid and gas, including heating, ventilating, cooling, air conditioning and plumbing systems in buildings. They also construct mechanical systems in industrial facilities, power plants, sewage treatment works, etc., and service and maintain the systems.

At their request, we are also representing 25,000 similar firms in associations in electrical sheet metal, insulation, roofing, painting, decorating and other specialty construction, which have organized into the Associated Specialty Contractors, Inc. This group employs over 800,000 workers, most of whom are unionized.

I am Thelma Stevens Mrazek, Director of Communications of the Mechanical Contractors Association of America. I also have staff responsibility for equal employment opportunity programs. With me is Frank J. Salatto, Jr., Vice

President of the W. G. Cornell Company of Washington, Inc., located in Brentwood, Maryland, who is Chairman of the Association's Equal Employment Opportunity Committee, and Alma L. Gaghan, formerly of the James F. Gaghan Plumbing Company of Alexandria, Virginia.

I will briefly summarize the views of construction contractors across the country in regard to equal employment opportunity and the Office of Federal Contract Compliance Programs (OFCCP) regulations and enforcement policies and state in general what new directions this industry feels should be taken. Mr. Salatto and Mrs. Gaghan will then relate their own personal experiences regarding OFCCP enforcement. They will provide a vivid example of the problems that firms in this industry have encountered.

First, we wish to make clear that construction contractors recognize and support Equal Employment Opportunity Laws and the principles of affirmative action. We wish to allay the fears of minority and women's groups who are concerned that their hard won and recognizable rights may be denied them.

Rather, we are here today to deplore the methods of enforcement and to speak for the rights of American employers, who provide the jobs in this country, and particularly small business people. We will demonstrate that federal regulations have not fulfilled intended objectives or proved workable, have instead assumed a "policing" attitude and have made adversaries of the government and people running companies.

Beginning in 1978 the Office of Federal Contract Compliance Programs issued a series of new regulations for the construction industry -- separate from service and supply industries -- that imposed goals that contractors must meet in hiring minorities and women on the jobsite. They also required each contractor to comply with 16 detailed affirmative action steps.

These regulations were written without regard to how the construction industry operates. They were unrealistic and sometimes impossible requirements that caused adverse effects on employers, employees and the industry itself. Attempts by the industry to modify the regulations during the so called "review" process or afterwards, proved futile.

These regulations have been enforced in an uneven and contradictory manner across the country. More often than not, the regulations and enforcement have focused on procedures and paperwork rather than on finding jobs for minorities and women.

The construction industry is different from other sectors of the national economy. Among other characteristics, eighty percent of the firms are small businesses, whose work is highly influenced by economic cycles and by seasons. It is divided into two segments:

(i) The union-employing contractor hires members of a special trade for specific work periods on request to a union hiring hall. The collective bargaining agreement determines the terms of referral, wages and conditions of employment. The union decides on its membership and primarily controls apprenticeship and training programs.

(2) The nonunion contractors, on the other hand, recruits, trains and hires workers for permanent employment.

Following is a brief summary of the major problems OFCCP regulations have caused construction firms:

1. Based on Executive Order 11246, OFCCP instituted an enforcement system whereby any construction contractor who once obtains a federal contract is policed under a system of "guilty until proven innocent."

2. Between 1978 until last winter OFCCP issued an unrelenting stream of proposed new regulations, rules and revisions with dubious legal authority and lack of substantive research or analysis to support OFCCP's expansion of authority. We believe such regulations ranged far beyond the scope intended by the Equal Employment Opportunity Act of 1964 or Executive Order 11246. As a result, construction industry employers were faced with confusion and instability and had to focus on coping with the onslaught of regulatory change rather than on the real objective of affirmative action.

As an example, on September 7, 1979, OFCCP published a proposed paragraph 7q, as an addition to 41 CFR 60-4.3 (a), with the stated intent of "clarifying" contractors requirements for the employment of women and minorities. Paragraph 7q states that construction contractors, who are once subject to OFCCP's regulations on the employment of minorities and women on federally funded jobs, are subject to those requirements on each and every one of their construction projects. In other words, any contractor who has one federal or federally funded construction project anywhere is subject to the OFCCP regualtions on all other work, everywhere in the country, regardless of whether the other jobs are public or private. This was not a clarification of existing policy, but a new rule which, if enforced, will significantly alter current regulations. Paragraph 7q has no legal foundation, we believe. Neither current statutory nor executive order authority grants OFCCP jurisdiction to review private (non-federal) work in areas where a federally-involved contract does not exist.

3. OFCCP promulgated "goals" and timetables for hiring minorities and women in the workforce that were unreasonable and disregarded the fact that there is a wide variety of skills and different levels of training needed for the various trades in the industry. They, for example, disregarded that in the case of plumbers and pipe fitters it takes four years of apprenticeship training. They also disregarded the fact that union employing contractors must rely on the unions voluntarily to supply minorities and women. Under the regulations referral unions in the construction industry are not required to comply with the on-site workforce goals.

In many instances these "goals" have been enforced as quotas. OFCCP reviews contractors with the absolute expectation that the "goals" will be met. They issue conciliation agreements with "make-up hours" where a contractor has not met the "goals". OFCCP even labels the goals in conciliation agreements as "required goals".

4. It set up 16 detailed actions or "steps" that each contractor was required to adhere to regardless of traditional industry practices. Union-employing contractors, for example, which rarely have employment departments because the firm hires from the hiring hall, were required to set up employment operations, advertise for employees, and actively solicit or hire, even though the employers' collective bargaining agreement may not have permitted this. Union employers were forced to add to their overhead and thus be less competitive in relation to nonunion contractors.

As another example, one part of the regulations [41 CFR-60-4 (a) (7d) requires union-employing contractors to:

> *Provide immediate written notification to the director [of OFCCP] when the union or unions with which the contractor has a collective bargaining agreement has not referred to the contractor a minority person or woman sent by the contractor, or when the contractor has other information that the union referral process has impeded the contractor's efforts to meet its obligations.*

OFCCP's Compliance Manual adds that:

> *To demonstrate compliance the contractor must produce copies of letters timely sent to the director and/or the appropriate OFCCP regional office to verify its claim that the union is impeding the contractor's efforts to comply.*

Instead of fostering cooperation between contractors and unions to employ minorities and women, the government has again set up an adversary environment. For those who know the real world of labor relations it is not difficult to imagine the explosive labor problems that union-employing contractors would face if they followed this requirement.

5. The 16 affirmative action steps require contractors to undertake for the most part extensive and unproductive efforts. These include keeping lengthy lists of minority and women's groups, subcontractors and suppliers and constant notification and record keeping of each new project or business development.

6. OFCCP also requires contractors to produce an extraordinary amount of documentation to prove their compliance. These include policy statements, memorandum, letters, forms or other records. A sample of the paperwork requirements that each construction contractor must produce has been prepared by MCAA's EEO Committee and is submitted for the record. You will notice it totals approximately 70 pages.

7. OFCCP enforcement has been uneven, in some cases heavy handed and expensive to many firms. OFCCP has sent untrained EEO Specialists, many of whom have little knowledge of the operations of private industry, to act as "judges" on a contractor's compliance.

According to OFCCP procedures, a contractor who has complied with the 16 affirmative actions steps should be found in compliance, but compliance is complicated by the fact that OFCCP's Compliance Manual, has subdivided the 16 steps. Unfortunately OFCCP provides no definition of "sufficient documentation" of the 16 steps or the 117 questions, and a contractor must score 100 percent on review of the 117 questions in order to be found in compliance.

If OFCCP finds that a contractor is not in compliance, the contractor is sent a "Conciliation Agreement" to sign, which usually sets higher goals and more stringent requirements. Experience has shown that there is little opportunity to negotiate the terms. A contractor who signs a conciliation agreement waives certain procedural safeguards in OFCCP's due process procedures. Usually there are no terms difining the bounds of the conciliation agreement and no expiration period. If contractors are found not to be in compliance with the conciliation agreement, they are subject to immediate enforcement action.

To obtain relief after enforcement begins, a contractor must spend hundreds of hours or dollars in legal fees before administrative remedies are exhausted and action is initiated in court.

CONCLUSION AND RECOMMENDATIONS

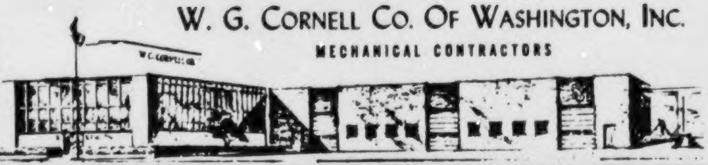
Construction employers regret the needless dissension and unproductive requirements that have been forced on the industry.

To reverse this situation, we recommend that:

1. Executive Order No. 11246 be revised to deemphasize regulatory methods and instead encourage the federal government, contractors, unions, minority and women's groups to cooperate in joint efforts to seek out, recruit, train and employ those who seek equal opportunity.
2. A Construction Industry EEO Advisory Committee, composed of representatives of the government, industry, unions and concerned minority and women's groups be organized to advise on formulating practical and workable regulations. The committee should review proposed regulations before they are promulgated to determine their necessity and validity. Regional hearings should be held before any regulations are issued.

This consensus approach of all involved parties should result in a program that is not based on confrontation and one that obtains realistic, workable and equitable results.

W. G. CORNELL CO. OF WASHINGTON, INC.
MECHANICAL CONTRACTORS



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STATEMENT BY
FRANK J. SALATTO, JR.
VICE PRESIDENT, W. G. CORNELL CO. OF WASHINGTON, INC.
AT OVERSIGHT HEARINGS ON OFCCP
BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE
July 29, 1981

Mr. Chairman and Members of the Committee:

My name is Frank J. Salatto, Jr. I am Vice President of W. G. Cornell Company of Washington, Inc. of Brentwood, Maryland, and also chairman of the EEO Committee of Mechanical Contractors Association of America (MCAA)

First, I would like to state we are in favor of Equal Employment Opportunity and indeed work to achieve it. However the methods utilized by the Office of Federal Contract Compliance Programs to implement the regulations has served only to create an atmosphere of confrontation between OFCCP and industry and have not achieved the objective of helping minorities and women to find jobs in the construction industry. Further, the regulations as implemented by OFCCP serve to fuel inflation in that they create nonproductive work that adds nothing but overhead.

I would like to relate to you my experiences with OFCCP --

When a contractor submits a low bid on a federally funded project, that contractor is subject to a pre-award review of their affirmative action program. At my first such review I was instructed to draw up an affirmative action program. I was given a sample program to use as a guide and advised that what I submitted should be similar. I reviewed the eight-page document and determined that the sample had a generous over-duplicity of words and that a quality program could be designed without the unnecessary words. I therefore submitted our plan which consisted of one and a half pages, saying the same, if not more than the sample. It was rejected because "it was not long enough." I was instructed to go back and prepare a longer plan. My second plan consisted of two additional pages of words with no change in the actual plan. The second plan was reluctantly accepted.

We were then instructed to submit our monthly Manpower Utilization Reports, which would keep the Agency informed of our "EEO Posture." On these reports, OFCCP will consider only hours worked on the jobsite. If for any reason a minority or female fails to work all available hours, it may affect adversely one's goals, even though the workforce is adequate to satisfy those goals. If for a period of several months the reports indicate underutilization of minorities, than the company is flagged for audit.

We were advised that if the unions failed to send minorities, we would be required to seek mechanics on our own, even though this may be in breach of our union contract; and if a problem developed, the government would assist us. One contractor tried this, and much to his chagrin, when the union retaliated, the government would not assist him.

At one meeting I suggested that the information requested for a specific reporting format was time-consuming,and I proposed an alternate procedure that would produce the same results. The Employment Opportunity Specialist, wanted my name, my company name and advised me that he would pay a visit to my office, and if there was no minority in my office staff, he would cite us.

At a later review, prior to award of a contract, I was warned that our records could be audited, and warned in such a manner that it was meant to be intimidating. I replied that an audit would not concern me, since our records were in order.

Several months later I was subjected to the "threatened" audit. Prior to this I determined I should protect the interests of the Cornell Company by documenting all the affirmative action in which I engaged.

During the audit I had my first encounter with 117 questions OFCCP asks to determine if one has exercised properly the 16 steps. Somewhere in the questions one must answer "no" for, no one, except OFCCP, is perfect. With a "no" answer there is a distinct possibility that one will receive a "boiler plate" conciliation agreement.

At the time of this audit I was very proudly showing off the documentation of my efforts. Rather than receive the expected praise I was taken to task because my documentation was on note paper rather than a standard form. As a result of that audit I developed several forms to satisfy OFCCP, but this in no way helped to employ more women or minorities.

The questions and requirements are designed for a company that is large and has a structured growth and not one that may hire only five or twenty-five people or whose employment fluctuates. It is obvious by the questions that no study was made of standard industry practices.

On May 21, 1979, I attended a meeting at the Department of Labor at which Mr. Weldon Rougeau, then director of OFCCP, stated that he "would have an investigative force second to none, not even the F.B.I." and "no one in his department would receive a promotion unless they performed."

At that moment I was horrified to think that a representative of the U. S. Labor Department had such an attitude and gave top priority to such tactics. I do not feel it is OFCCP's function to operate like the F.B.I. The emphasis should be on achieving equal opportunity and not on regulation.

It was shortly after this that nine mechanical contractors in the Washington, D. C., area were issued identical conciliation agreements, which they had to sign or risk debarment. At least one of the contractors had in excess of the goals for minority utilization; however, this did not satisfy the 16 steps in the view of the Employment Opportunity Specialists. One wonders, is the paperwork more important than the employment? In the beginning we were told that if we were in compliance we would not be audited.

When W. G. Cornell Co. was last reviewed, the EOS stated that our records and documentation showed good faith, and she was amazed that with such a good program I had not achieved the goals.

Regardless, I was given a conciliation agreement to sign because: 1) I did not orally explain to the minority and females on the job our affirmative action program, although it was done by the memo attached to the check, and 2) while we hired four minority workers, none were female.

It appears that contractors are in a "Catch 22" position.

It appears that the OFCCP is more concerned with how many citations they can write, rather than how many people may be hired. As one official from OFCCP stated, if we achieve equal opportunity, I am out of a job. The attitude appears to be, "we must find a way to issue citations."

Our local Mechanical Contractors Association developed in conjunction with our unions an outreach program. Contractors and union members attend career day classes to try to interest minorities and females in the trades. Locally we have instituted and held for the last three years, an orientation class for women in December. Contractors spent considerable time organizing, planning and teaching these classes at night to explain the industry in general and the mechanical trades in particular. The attendees are taken through the apprenticeship school for plumbers and pipe fitters and have a question and answer period with female apprentices.

The program is advertised on the radio, in newspapers, announcements sent to schools and all the womens' groups listed in the regulations as being in a position to refer women with specific skills. These groups are supposed to be prepared to refer the crafts needed. However, one such group wrote in reply to our request that we should post our notice in laundromats and felt that this reply discharged their duty as outlined in the regulations.

Many organizations receive government funding supposedly to train women to enter the crafts. Organizations in our area had in their individual classes all of 15 to 20 trainees at any one particular time. It can be reedily porcieved that many such classes would be needed to produce the numbers required by the regulations.

We believe the Department of Labor has an obligation to report on the results of government funded programs, i.e., How much money has been expended and how many women have benefited and gone into the trades? Questions need to be answered about, Are such programs benefiting the women who are supposed to be the beneficiaries? What is the unit cost for each beneficiary versus administrative cost. How many of the beneficiaries are still active in registered apprenticiship programs with the goal of becoming a journey person?

Programs funded with tax payers money have as much responsibility to account for their efforts as contractors who receive federal contracts for projects funded with tax payers money.

After all this effort over a three year period 19 women decided to enter the apprenticiship program and a number have dropped out. We have documented our efforts and invited and had in attendance members of the OFCCP office at our classes. We have not yet approached the first goal of 3.1 percent, which was required in 1978-79. OFCCP insists the goal of 6.9 percent is attainable now and refuse to review and change the goals to a realistic number.

After one such class an OFCCP official was stating how good the class was and that he was impressed with our effort. I told him I thought the government and industry should work together and not have the government be a police force. His reply was that the government's role was to be the police force and make sure the industry complied with the law.

I have given several workshops on how to establish and maintain an affirmative action program. As a contractor I have made proposals to groups on how to get minorities and women interested in apprenticiship training programs. In contrast, OFCCP participates in workshops sponsored by advocacy groups on what an individual's rights are and what recourse they may have against an employer. While it is important that employees are made aware of their rights, it is just as important, if not more, that OFCCP spend its time and tax payers' money in a productive educational program to instruct potential beneficiaries how to prepare for and obtain a job. I believe the OFCCP should be a partner with the private sector in holding workshops for interested groups in how to get jobs. I further believe OFCCP should hold workshops with business on how to establish and maintain an affirmative action program and jointly develop resources to obtain the objectives, rather than walk in and issue platitudes and citations. The ultimate objectives should be jobs not paperwork.

I had the ocassion to review a social studies assignment with my son last year and read that in the 1880's the Department of Agriculture was formed to help the farmer. I asked a representative of the Office and Management and Budget, When did our government decide to become our adversary instead of our helper?

The purpose of affirmative action would be better served if the collective expertise of the schools, community and government was directed to helping the contractor meet affirmative action obligations. The contractor is the one who provides the jobs and limiting his capability to do so does not help the people who are supposed to be the beneficiaries of affirmative action programs.

It concerns me that private enterprise, which made this country strong, has become the scape goat of everything that ails this country. The only rights left for business are to make payroll - and pay taxes and to be sure they stay healthy enough to accomplish both.

With me today is Alma Caghan - Alma is a widow. When her husband died, two of her competitors stepped in to help her over the hurdle of maintaining the business and make the transition a little easier for her. Although she is female, minority, handicapped and averaged only five employees, she was audited by OFCCP. The problems were such for her that she decided it was not worth it to stay in business and deal with the government so she sold the business and walked away from what she and her husband built up.

STATEMENT BY

ALMA L. GAGHAN

AT OVERSIGHT HEARINGS ON OFCCP

BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE

July 29, 1981

Mr. Chairman and Members of the Committee:

I am Alma L. Gaghan, a founder with my husband of the James F. Gaghan Plumbing Company, Inc., of Alexandria, Virginia.

For many years my husband and I worked hard to build up a mechanical contracting business. After his death in December 1977 I naturally faced the difficult decision of whether to continue. After deciding that my handicap was not severe enough to prevent me from bearing the full responsibility of the business, I was still concerned as to whether I, as a women, would be accepted into the construction industry with confidence. My fears were quickly allayed. Other mechanical contractors, belonging to our local association, and the union were extremely supportive and gave me the much needed encouragement to continue.

In April 1978 an experienced and knowledgable colleague joined me, and by diligently bidding and procuring contracts and through hard work and long hours, we started the corporation rolling again. Much of our work involved federally funded projects.

Shortly after, we learned that the Office of Federal Contract Compliance Programs was increasing its affirmative action requirements. Through the help of the District of Columbia Mechanical Contractors Association we spent a considerable amount of the time of our small office in developing an affirmative action program, including policy statements, posting notices, filling out forms and carefully filing documentations in sixteen folders to have proof of our efforts in each area as required by the regulations.

During this period our work load varied, but we averaged about five employees. All of these were referred to us according to our collective bargaining agreement with the local union of the United Association of Plumbers/Pipe Fitters. We tried to obtain as many minorities as we could and did exceed the goal most of the time.

In April of 1979 we were audited by the OFCCP, and to my shock and amazement were charged with thirteen violations. One of the deficiencies cited was our failure to meet the goals of 25 percent minority employment. During the month of February, 1979, our reported minority employment dropped to 18 percent of the hours worked on the job site. The one minority we had, in this case, was married in February of 1979 and elected to take seven working days off to go on his honeymoon. This seven days represented fifty-six working hours on the job site. Had the minority been on the job site, that percentage would have increased to 26.6 percent.

We were audited for an eight month period from July, 1978, through February, 1979, and not once did the Equal Opportunity Specialists from the OFCCP ever consider that our average total for minority employment was 29.38 percent. For this one month period, I suppose, we were bound to hire another minority in order to fulfill our goal -- never mind the fact that when the new bridegroom returned to the job site we had another difficult problem on our hands. The newly hired minority could not be laid off and neither could he/she be absorbed by the company, for we were a small business, and it is not economically feasible. Instead, we would have been required to lay off a non-minority regardless of his seniority.

The other twelve violations as stated in OFCCP's letter included:

1. "Failure to meet the female utilization goal of 3.1 percent for all on-site construction crafts. This is in violation of 41 CFR 60-4.6, Appendix A."

2. "Failure to insure and maintain a working environment free of harassment, intimidation, and coercion at all sites and in all facilities where your employees are assigned to work. This is in violation of 41 CFR 60-4.3, Specification 7 (a)."
3. "Failure to notify minority and female recruitment sources and community organizations when your company had hiring opportunities. This is in violation of 41 CFR 60-4.3, Specification 7(b)."
4. "Failure to establish and maintain a current file of the name, address, and telephone number of each minority and female walk-in applicant and minority or female referral from a union, recruitment source or community organization, and of the action that was taken with respect to each individual. This is in violation of 41 CFR 60-4.3, Specification 7(c)."
5. "Failure to disseminate company EEO policy to unions, training programs and internally. This is in violation of 41 CFR 60-4.3, Specification 7 (f)."
6. "Failure to maintain a record that you review, at least annually, the company's EEO policy and affirmative action obligations under the contract specifications with all on-site supervisory personnel (superintendents, general foremen, etc.). This is in violation of 41 CFR 60-4.3, Specification 7 (g)."
7. "Failure to disseminate EEO policy externally to all recruiting sources. This is in violation of 41 CFR 60-4.3, Specification 7 (h)."
8. "Failure to encourage present minority and female employees to recruit other minorities and women and, where reasonable provide after school, summer and vacation employment to minority and female youth both on the site and in other areas of the Contractor's workforce. This is in violation of 41 CFR 60-4.3, Specification 7 (j)."
9. "Failure to contact schools and organizations with minority and female

enrollment that can serve your hiring needs. This is in violation of 41 CFR 60-4.3, Specification 7 (i)."

10. "Failure to conduct at least annually an inventory and evaluation at least of all minority and female personnel for promotional opportunities, and encourage these employees to seek or to prepare for, through appropriate training, such opportunities. This is in violation of 60-4.3, Specification 7 (1)."
11. "Failure to ensure that all facilities and company activities are non-segregated. This is in violation of 41 CFR 60-4.3, Specification 7 (n)."
12. "Failure to conduct a review, at least annually, of all supervisors' adherence to and performance under the Contractor's EEO policies and affirmative action obligations. This is in violation of 41 CFR 60.4.3, Specification 7 (p)."

I had not attained the goal for women because as a union-employing contractor, I obtained skilled workers from the hiring hall, and the union had none available to send me. A number of the other citations were for parctices that are not customary among union-employing contractors, and the documentation I had for the other citations was not accepted as sufficient.

While the OFCCP audit and review took about three months to conduct, I was given only five days to sign the agreement and return it.

In all good conscience, I could not commit myself or the James F. Gaghan Plumbing Co., Inc. to sign the Conciliation Agreement. The wording of the penalty was not clear. While, on the one hand, signing the Agreement did not make the signatory guilty of the violations cited, the stipulations in the Agreement, on the other hand, binds the signatory to further monitor his/her activities, while making an attempt to conduct business. I perceived this action of signing the Agreement tantamount to an admission of guilt. This was a very discouraging situation.

To try to justify my position and obtain some relief from this injustice, I went to the local OFCCP office to keep an appointment with the office supervisor, even though I was suffering from pneumonia. The supervisor did not keep the appointment, and the matter has never been completely resolved. This only added insult to injury, and I landed in the hospital the next day.

My experience made me extremely disillusioned with this method of trying to achieve "equal opportunity." I felt harassed and assaulted. It is a difficult job to keep a small business afloat, particularly in the construction industry. I was trying to create jobs and perfectly willing to hire any qualified and capable person. I am of Filipino/Mexican/Spanish origin and have no prejudice against other minorities and certainly not women. I was making a "good faith effort." Why should my government send a representative into my office with an attitude of "you are at fault" and demand that I justify my intentions with piles of paperwork. Certainly there is a more equitable and cooperative way to achieve equal opportunity in this land.

Mechanical Contractors Association of America, Inc.
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Telephone (202) 654-7960 TWX: 710-825-0423

October 23, 1981

Mr. James W. Cisco, Acting Director
Division of Program Policy
Office of Federal Contract Compliance Programs
U. S. Department of Labor
Washington, D. C. 20210

RE: RESPONSE TO PROPOSED RULE
ISSUED AUGUST 25, 1981

Dear Mr. Cisco:

The Mechanical Contractors Association of America, Inc., (MCAA) represents 1700 mechanical contracting firms, which employ over 150,000 plumbers, pipe fitters and other tradespersons, who are mostly members of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry. MCAA has approximately 80 affiliated associations located across the United States. MCAA members perform primarily commercial and industrial work.

MCAA has reviewed the extensive set of regulations as printed in the Federal Register on August 25, 1981, and wishes to make the following comments:

> While the members of this association support the Equal Employment Opportunity Act of 1964 and its humanitarian appeal for equal employment opportunity, we have become increasingly concerned about the way this law has been implemented, particularly through Executive Order 11246 and the regulations as promulgated and enforced by the Office of Federal Contract Compliance Programs. The Executive Order and regulations have caused confrontation between people and their government and between different groups of people rather than promoting cooperation. The focus has been on means of enforcement rather than on attaining the objective of equal opportunity.
>
> Basically, we have come to the position that Executive Order 11246 is not serving the purpose for which it was intended as written and should be revised to stress cooperation between the government, industry, unions and "affected classes" in recruitment and training. The emphasis on "policing" the industry should be reduced.
>
> MCAA realizes that revision of the Executive Order is not within the authority of OFCCP. We have therefore reviewed the proposed regulation and submit these comments for improving the regulations, until

the Executive Order can be revised.

The proposals offer some improvement over presently enforced regulations. However, they still do not meet the concerns of this association, as we have expressed previously to OFCCP during meetings of the Construction Working Committee, during 1979-80, and in comments presented by this association during the last three years.

OFCCP's present regulations impose rigid conditions on the construction industry that are separate and different from those applied to manufacturing and supply industries. This recognizes that the construction industry does operate differently from other industries. However, the regulations do not recognize the realities of how the construction industry is organized and functions. They force conditions upon the industry which have been harmful to individual contractors, particularly in the union employing sector.

As MCAA has pointed out previously the construction industry is composed primarily of small businessmen grouped into two segments:

(1) The union-employing contractor hires members of a special trade for specific work periods on request to a union hiring hall. The collective bargaing agreement determines the terms of referral, wages and conditions of employment. The union decides on its membership and primarily controls apprenticeship and training programs.

Union-employing contractors therefore do not ordinarily maintain a personnel department, which conducts recruitment and training programs, nor do they advertise for employees. Their overhead is thus reduced, and although they pay higher wages, they are better able to compete with nonunion firms.

In addition, union-employing specialty contractors generally hire only from one trade. In the case of mechanical contractors these are plumber and pipe fitter apprentices and journeypersons, who require up to four years of apprenticeship training. To qualify as an apprentice, a person must have knowledge of mathematics and as an apprentice must learn basic science regarding matter, heat, expansion and contraction of gases, air, flow, refrigeration, etc., in addition to having safety training. A minority, female or white male cannot be hired off the street and be placed on the job without training and without union sanction.

(2) Nonunion contractors, on the other hand, recruit, train and hire workers for permanent employment, and maintain personnel departments for this purpose. They hire various skill levels.

OFCCP's imposition of goals and rigid 16 step requirements have not recognized these differences.

We urge that until the Executive Order is amended, OFCCP set up a Construction Industry Advisory Committee, composed of representatives of the government, industry, unions and members of the "affected classes" who understand how the industry operates. This group should be charged with reaching a concensus on how the regulations can be revised to meet the needs of the industry and to bring minorities and women into the industry.

-3-

As an example of how the regulations might be restructured, MCAA offers the following recommendations:

We call your attention to the fact that Executive Order 11246 as amended contains a provision, Subpart E., Section 213 regarding the presentation of "Certificates of Merit" to those contractors or unions who have affirmative action programs that conform to the purposes and provisions of the order. To our knowledge this section has never been implemented by the Department of Labor. We recommend that a strong effort be made to put this section into effect so that contractors and unions will be motivated to pursue affirmative action programs. This would indeed be a positive approach by the Department of Labor.

Rather than forcing every contractor regardless of their segment of the industry. type of construction or locality to comply with one set of rigid requirements, we recommend that flexibility be permitted.

OFCCP might accomplish this by permitting construction contractors to choose between three groupings for compliance, as shown on the accompanying Attachment 1. We recommend that equal policy emphasis be given to each of the three groups.

Group I would be for those construction contractors who participate in Industry-wide Recruitment and Training Programs, which are organized voluntarily by employers, unions, minority and women's groups and government representatives. This approach has been permitted to some degree under present regulations (60-4.5). A model for an approved program has been developed by a representative group of Hometown Administrators and is described in Attachment 2.

MCAA believes that this approach is the most effective and equitable method of enforcement for the union-employing sector and highly recommends that OFCCP give this approach the priority attention it deserves.

Group II would be for those construction contractors who belong to voluntary associations where there is no applicable Industry-wide Recruitment and Training Program. This approach would be applicable for both union-employing and nonunion construction contractors. The voluntary association should be permitted to conduct a substantial portion of a contractor's affirmative action program, although the individual contractors would retain ultimate responsibility. This approach has been permitted to some degree under present regulations (60-4.3(a)8). It should be expanded and broadly encouraged.

Group III would be for independent contractors who do not participate in Industry-wide programs or associations. These contractors would be responsible for conducting their entire affirmative action program.

In addition to the flexibility provided, a major advantage of the Group I and II to the many small contractors in the industry is that he or she is relieved of a large share of the considerable paperwork burden. Minorities and women gain in that the construction industry is joining in a concerted effort in their behalf, and a cooperative approach is fostered.

The thresholds as proposed in the regulations, i.e., $10,000 and $50,000 would exempt almost no mechanical contracting projects from the involved nine step requirements. The equipment installed by mechanical contractors, i.e., large boilers, chillers, air conditioning and plumbing systems in institutional systems, for example, run into the thousands of dollars alone, even before the cost of other materials and labor are included. This is in stark contrast to the manufacturing and service and supply industries, which have proposed thresholds of $1 million in federal contracts or 250 employees.

MCAA therefore recommends that the "threshold" levels be expanded to include at least three levels with increasing compliance responsibility according to the size of a construction firm or the total amount of its federal contracts. This is described in Attachment 3. The $5 million total volume or work is recommended as the level for extensive compliance. This is the present Small Business Administration standard for the industry. Those below this standard should not be required to carry out extensive paperwork requirements.

In regard to goals MCAA has previously expressed its concern over their imposition on a nation-wide basis. If they are to be employed in affirmative action, they should be set on a voluntary basis by local area industry groups, unions, minorities and women. In no case should goals be treated as quotas.

We call your attention to the fact that OFCCP has set criteria for determining and implementing goals for the service and supply industries (60-2.11 and .12). We question why OFCCP has never used these same criteria for the establishment and implementation of goals in the construction industry, particularly in regard to the availability of minorities and women "having requisite skills in the immediate labor area" or "main area in which the contractor can reasonably recruit." Similar criteria is used in setting goals for apprentices under Bureau of Apprenticeship and Training regulations (Title 29, Part 30, 30.4, Item E).

MCAA is also concerned that the construction industry has not been given equal treatment in regard to the application of the 80 percent standard in meeting goals (60-2.11), whereby contractors would not be required to establish goals and timetables and would be presumed to have reasonably utilized minorities and women when 80 percent employment is achieved.

A strong example of how the OFCCP has misinterpreted the practices and reality of the union-employing construction industry and forced confrontation in labor relations is seen in the "Standard Federal Equal Employment Opportunity Construction Contract Specifications" Item #5 (60-4.3), which states "Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the Contractor has a collective bargaining agreement, to refer either minorities or women, shall excuse the Contractor's obligations under these specifications..." This provision is unrealistic and unfortunate in its implications.

This requirement misinterprets and undermines the collective bargaining process. Contractors do not control collective bargaining nor the union with which they are bargaining. The collective bargaining process involves mutual agreement. The responsibilities cannot be placed on one party to the agreement. The Department of Labor should not force one party into confrontation with the other. It would seem in the interest of the Department of Labor to promote mutual agreement, not confrontation and to encourage parties to uphold collective bargaining agreements. The requirements could better be met by requiring unions to comply since they establish their own hiring hall procedures.

Requirements along these same lines should be struck from the nine steps as pointed out below.

In regard to the proposed nine step requirement the meaning of the phrase "The contractor must be able to demonstrate fully its efforts" is unclear. An explanation of how this differs from "document" and how it would be implemented practically is necessary.

Step "a" contains an impractical requirement that a contractor "will assign two or more women to each construction project". The impracticality of this can be seen when one looks at the shortage of women in the plumbing and pipe fitting trades unions. In the Department of Labor's "Annual Construction Industry Report, April 1981" it is shown that there were only 345 female pipe fitters, steam fitters and sprinkler fitters apprentices in the building trades apprenticeship programs and 176 female plumbers throughout the United States in 1979. Even though these figures may well be higher today, there is little likelihood that MCAA's 1700 member firms would be able to "assign two or more women to each construction project."

Step "b" establishes a requirement that a contractor "actively seek and utilize alternative recruitment and labor sources...whenever traditional sources of labor are unable to supply sufficient numbers of minorities and women to fulfill the contractor's goal obligation." This requirement would, in the case of an exclusive hiring hall clause, force a contractor to abrogate the terms of a collective bargaining agreement.

Step "c" under which off-the-street applicants must be documented requires a union-employing small businessman to undertake an extraordinary amount of paperwork for an unproductive purpose. The union-employing segment of the construction industry has a structured apprenticeship program which generally starts once a year. If an applicant is a prospect for the apprenticeship program, then he or she should be sent to the union. This step would better be served by requiring the unions to document these referrals in relation to the apprenticeship programs. Further, if there are no openings in the foreseeable future, why should a contractor or applicant engage in this excercise in futility? Also, the applicant, if not trained, would be of no value to the contractor. The step is impractical and should not be required of union-employing contractors.

Step "d" -- notifying the director of union non-cooperation -- forces union-employing contractors into confrontation with an organization that controls their labor supply. It is detrimental to good labor relations and nonproductive. This requirement should be struck from the regulations.

Step "i" requires contractors to assure that seniority practices do not conflict with affirmative action efforts. Again, a contractor has no control over a union's seniority policy. In addition, it is our understanding that a recent Supreme Court decision established that seniority practices have precedence. We ask: Would minorities be willing to give up their seniority for a female or vice versa?

In conclusion, MCAA urges OFCCP to recognize that the regulations presently in effect and as proposed in large part do not apply realistically to the operations of the construction industry. They are a severe burden to many contractors and are impractical in obtaining the objectives of equal employment opportunity. We urge OFCCP to completely revise the regulations to stress recruitment and training and union entry, where applicable. We suggest several ways this might be done, and we recommend that a representative Advisory Group be established to develop further proposals and details.

For your information MCAA and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry are in the process of forming a Joint EEO Task Force to develop a voluntary affirmative action effort for this segment of the industry.

Sincerely,

Frank J. Salatto

Frank J. Salatto, Chairman
Equal Employment Opportunity Committee

/jaf

cc: Vice President George Bush
Senator Orrin G. Hatch
Representative Augustus F. Hawkins
Ellen M. Shong